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THE

LAW AND PRACTICE

OF

PETITION OF RIGHT

UNDER

THE PETITIONS OF RIGHT ACT, 1860.

WITH FORMS AND AN APPENDIX CONTAINING THE LAWS REGULATING PROCEEDINGS BY PETITIONS OF RIGHT

IN

IRELAND, SCOTLAND, AND CERTAIN COLONIES AND DEPENDENCIES.

BY

WALTER CLODE,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

By way of preface I have only to ask those into whose hands this book may fall, to bear in mind that it is the first one dealing with this branch of law, and to take a lenient view of any errors and omissions upon that ground.

WALTER CLODE.

3, HARCOURT BUILDINGS,
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TABLE OF CONTENTS.

PART I.

CHAPTER I.

DEFINITION AND ORIGIN OF PETITION OF RIGHT.

PAGE

Definition 1
Origin 1
The two theories of its origin stated and discussed . . . 2
Origin of the right of petitioning the Crown. 4

CHAPTER II.

SKETCH OF THE HISTORY AND DEVELOPMENT OF THE USES OF PETITION OF RIGHT.

(*a.*) *History*:—

Petitions in Parliament 6
Contents of 7
Some of them "petitions of right" . . . . . *ibid.*
How petitions in parliament were dealt with . . . *ibid.*
Referred either to (1) ordinary, or (2) special tribunal. . 8–10
Same course with petitions "of right" 11
Two examples of this procedure 12
Survival of this procedure with regard to petitions of right to the present day 13
Reason of this survival 14
By transfer of petitions other than those of right, some (1) to the ordinary legal tribunals, (2) others to parliament, (3) and others to "the Council" 14–17
Petitions of right not so transferred, but still addressed to the king. 18

(*b.*) *Uses*:—

Original use of petition of right 19
To obtain restitution of specific property . . . . *ibid.*

PAGE

But not debts or damages 19
Reason for this . . . . . *ibid.*
Other existing remedies for recovery of "debts" . . . 20
By petition for a "liberate" 21
Difference between petition "of right" and for a "liberate" 22–23

CHAPTER III.

WHY A PETITION OF RIGHT SO CALLED.

Staunford's derivation 24
Objections to . . . . . *ibid.*
The true derivation suggested 25
From the endorsement 26

CHAPTER IV.

TO WHOM A PETITION OF RIGHT LIES.

The Sovereign 27
But not the consort or the princes . . . . . *ibid.*
Can the king be joined with a subject? 28
The old practice *ibid.*
The modern practice— 29
(1) before the Act of 1860 . . . . . *ibid.*
(2) since the Act of 1860 30
Third parties under the Act of 1860 . . . . . *ibid.*
Does the petition abate by the death of the Sovereign? . . . 31
Common Law doctrine of abatement 32
Modified by 1 Ed. 6, c. 7, and 1 Anne 1, c. 8 . . . *ibid.*
Practice under Petition of Right Act, 1860 33–34

CHAPTER V.

WHO MAY SUE BY PETITION OF RIGHT.

Subjects governed by the common law 35
The position of colonial subjects not governed by the common law . 36
The case of Canada . . . . . *ibid.*
Laporte v. *the Principal Officers of Artillery* . . . 37–38
Can subjects sue jointly? 39
Is the right of suit assignable 40

CHAPTER VI.

WHERE THE PETITION SHOULD BE SUED.

Claims arising out of English jurisdiction 42
Where there is a proper tribunal in the place where the property is . *ibid.*

PAGE
Reiner v. *Marquis of Salisbury* 42–43
Or in the place where the contract is made 44
Where there is no such tribunal 45
And (1) the claim is for land . . . . . *ibid.*
Re Holmes. 46–48
(2) or in contract 48–49

CHAPTER VII.

FOR WHAT A PETITION OF RIGHT WILL NOT LIE.

The injury must be a legal one 50
Mr. Anstey's theory a mistaken one . . . . . *ibid.* 51
The true theory given in *Feather* v. *Reg.*. 52
The subject cannot sue for all legal injuries . . . . . *ibid.*
Division of legal injuries 53
The subject cannot sue by petition for a tort. . . . . *ibid.*
The reason why . . . . . *ibid.*
Authorities :—
Canterbury v. *Reg.* 54
Tobin v. *Reg.* 55–57
Feather v. *Reg.* 58
The above rule obtains in Canada—
Queen v. *McFarlane* 59
Queen v. *McLeod* 60
And also in America—
Gibbons v. *United States* 61
Langford v. *United States* . . . . . *ibid.* 62
The true test whether a petition lies 63

CHAPTER VIII.

AN ENUMERATION OF THE CASES IN WHICH PETITION OF RIGHT LIES. THE AUTHORITIES UPON THE SUBJECT CONSIDERED.

What authorities cited 64
Petitions in parliament omitted . . . . . *ibid.*
Reasons for this omission 65
Discontinuity in the line of authorities . . . . . *ibid.*
Classification of the authorities 66–67

CHAPTER IX.

OF PETITION OF RIGHT TO OBTAIN RESTITUTION OF SPECIFIC PROPERTY.

Of petitions for restitution of property generally 68
And the authorities by which they can be supported . . . *ibid.*
Text-writers 69

PAGE

Decisions :—
Tobin v. *Reg.* 69
Feather v. *Reg.* . . . . . *ibid.*
The various kinds of property which can be recovered considered . 70
Realty :—
(1) Corporeal hereditaments 70–72
(2) Incorporeal hereditaments 73
Rent charges . . . . . *ibid.*
Corodies . . . . . *ibid.*
Advowsons . . . . . *ibid.* 74
Seignories 75
Gales 75–78
Personalty :—
(1) Impure 79
Leaseholds . . . . . *ibid.* 80
Mesne Profits :—
The common law doctrine 81
Modified by 28 Ed. 1, c. 19, and 29 Ed. 1 . . . . *ibid.*
Lord Coke's interpretation of these statutes 82
Supported by Lord Somers in the *Bankers' Case* . . 83–84
Decision in *Oldham* v. *The Lords of the Treasury* . . . 85
The modern practice 86
In re Gosman . . . . . *ibid.*
(2) Pure Chattels :— 87
If lost or destroyed can their value in money be recovered 88–89
(3) Money :—
Formerly doubtful whether it could be recovered . . 90
Lord Denman's opinion . . . . . *ibid.*
Recent cases in which money paid under mistake has been recovered :—
Percival v. *Reg.* 91
Perry v. *Reg.* . . . . . *ibid.*
DeLancey v. *Reg.* . . . . . *ibid.*
Crossman v. *Reg.* . . . . . *ibid.* 92
Mesne profits thus recovered 93
Salary . . . . . *ibid.*
Tolls 94–95
Interest on money taken apparently not recoverable . 96
Money paid to the Crown for the benefit of a subject not recoverable upon petition :—
The Baron de Bode's Case 97
Frith v. *Reg.* 98
Rustomjee v. *Reg.* 98–101
Kinloch v. *Reg.* 102–103
II. Of the taking and detaining by the Crown 104

PAGE

Seizure must be wrongful 104
Remedy for detention by patentee of Crown . . . 105
Whether petition can be sued where monstrans available? 106–107

CHAPTER X.

PETITIONS OF RIGHT FOR DAMAGES FOR BREACH OF CONTRACT.

Petitions for damages 108
The state of the law previously to *Thomas* v. *Reg.* . . *ibid.* 109
Thomas v. *Reg.* stated 100
The petition . . . . . *ibid.*
The demurrer 111
The judgment . . . . . *ibid.*
Reasons in favour of the petition . . . . *ibid.*
Reasons against 112
(1) The absence of precedent . . . . *ibid.*
(2) The inferences therefrom . . . . *ibid.*
These inferences rebutted . . . . . *ibid.*
The Bankers' Case 113
The judgments therein 114
Lord Somers' judgment . . . . . *ibid.*
Dicta of text-writers and judges 115
The judgment in *Thomas* v. *Reg.* examined . . 116
Was the judgment on a petition for value an *amoveas manus*? 117–119
The Bankers' Case explained 120
Lord Somers' argument and judgment . *ibid.* 121
What Lord Somers meant 122
The Court's interpretation of Lord Somers' argument 123
Reasons against this interpretation . . . *ibid.*
Aynesham's Case examined . . . *ibid.* 124
A case of a petition for a "liberate" . . 125
Petitions for "liberates" not petitions of right . 126
Position of petitions in Parliament . . . *ibid.*
Petitions in Parliament not all petitions of right . 127
Reasons for so holding . . . . *ibid.* 130
Summary of the argument 130
Explanation of
Baron Comyn's opinion 131
Buller, J.'s, dictum in *Macbeth* v. *Haldemund* . *ibid.*
Lord Denman's opinion in the *Baron de Bode's Case* 132
The judgments in
Tobin v. *Reg.* 133
Feather v. *Reg.* . . . . *ibid.* 134

PAGE

Cases subsequent to *Thomas* v. *Reg.* 135
Kinloch v. *Reg.* . . . . . *ibid.*
De Dohsé v. *Reg.* . . . . . *ibid.*
Eyre v. *Reg.* . . . . . *ibid.*
Reg. v. *Doutre* 136
Windsor, &c., Railway Co. v. *Reg.* . . . *ibid.* 138
Some Canadian cases 138
A tort cannot be treated as a breach of contract . . . 139

CHAPTER XI.

Petitions of Right in Equity.

Whether such petitions can be sued 141
Early applications to the "Chancery" explained . . . *ibid.*
Why such petitions should not be sued 142
Petitions in Chancery before Bovill's Act :—
Clayton v. *Attorney-General* 143
Taylor v. *Attorney-General*. 144–146
Recognition of the practice adopted in these cases by Wickens, V.-C. 147
Petitions in Chancery since Bovill's Act . . . . *ibid.*
Kirk v. *Reg.* (damages and injunction) . . . . *ibid.*
James v. *Reg.* (declaration of title) 148
Re Brain (relief against forfeiture) . . . , 149
In re Tufnell (damages) 150
Cooper v. *Reg.* (damages and declaration of title) . 151–152
Re Gosman 153
Kinloch v. *Reg.* . . . . . *ibid.*
Northam Bridge Co. v. *Reg.* . . . . . *ibid.*

CHAPTER XII.

Petitions in the Admiralty Division and for Colonial Stock.

Part II.

23 & 24 Vict. c. 34. "An Act to amend the law relating to petitions of right to simplify the proceedings and to make provisions for the costs thereof."
Preamble 157
Section 1. Petitions of right may be intituled in any of the superior courts at Westminster. The form, nature and contents of the petition as in Schedule No. 1 . . *ibid.* 163

PAGE

Section 2. Petition to be left with the Secretary of State for the Home Department, for Her Majesty's fiat. . 163–167
Section 3. Upon fiat being obtained, petition, &c., to be left at office of Solicitor of the Treasury, endorsed as in Schedule No. 2 167–168
Section 4. Time for answering by the Crown. Power to change the court or venue 169
Section 5. Time for answering by other persons parties to the petition 170–173
Section 6. The answers or plea to such petition . . . 173–175
Section 7. The practice and course of procedure in action and suit between subject and subject shall extend to petitions of right so far as applicable 175–182
Section 8. Decrees or judgments by default. 182
Section 9. Form of judgment or decree 183
Section 10. Effect of judgment of *amoveas manus* . . 184–185
Section 11. Costs recoverable by the Crown and any other person party to the petition 186
Section 12. The suppliant to be entitled to costs against the Crown and other parties to the proceedings . . *ibid.* 187
Section 13. Decree or judgment in favour of the suppliant to be certified to the Treasury or the Treasurer of Her Majesty's Household in form of Schedule No. 5 . 187
Section 14. Satisfaction of judgment and costs . . . 187–190
Section 15. Power to judges to make rules and regulations, &c. . 191

ORDER, 1ST FEBRUARY, 1862.

1. Petitions of right. Petitions to be filed. 2. Marked with name of judge. 3. Printed and stamped copies for service. 4. Interrogatories for examination of respondents. 5. Right to petition *in formâ pauperis*. 6. Rules as to petitioning *in formâ pauperis*. 7. Practice in reference to suits shall apply to proceedings by petition of right. 8. Duties and fees of officers of the Court 192–193
Section 16. Interpretation of terms 194
Section 17. Short title . . . . . *ibid.*
Section 18. Nothing to prevent suppliant proceeding as before . . 195
Schedule of forms 195–200
Appendix A. A return of all the petitions of right between the years 1860 and 1876. 201–212
Appendix B. The laws regulating proceedings by petitions of right in Ireland, Scotland, and certain colonies and dependencies 213

TABLE OF CASES.

PAGE

Atty.-Gen. *v.* Churchill . . 170
Aynesham's Case 115, 121, 123, 126

Bacon *v.* Reg. 91, 162
Baker *v.* Reg. 202
Bello Campo's Case . . . 9
Banda & Kirwee Booty, In re 102
Bangor's, Dean of, Case . . 13
Bankers' Case 11, 20, 21, 22, 83, 113
Baring *v.* Reg. 208
Basyng's Case 128
Beatson *v.* Skene 179
Beisney's Case 128
Betts *v.* Reg. 206
Bissop's Case 128
Blake *v.* Reg. 204
Bode's, Baron de, Case . 24, 29, 51, [90, 97, 109, 115, 132, 161
Bonland's Case 10
Boult *v.* Reg. 202
Brain, Re . 77, 149, 161, 199, 211
Branson *v.* Reg. 209
Broadoak's Case 13
Burke *v.* Reg. 93, 108
—— *v.* —— 205

Cadell's Case 51, 129
Calviton's Case 13
Campbell *v.* Hall 36
Canterbury, Visct., *v.* Reg. 31, 54, [116, 133, 161
Cave's Case 12
Chevrier *v.* Reg. 72
Christchurch's, Prior of, Case . 129

PAGE

Churchwood *v.* Reg. 109, 161, 203
Cirencester's, Abbot of, Case . 9
Clare *v.* Reg. 201
Clayton *v.* Atty.-Gen. 29, 109, 143, [147, 161
Clerk's Case 128
Conrad of Colerne's Case . . 88
Cooper *v.* Reg. 151, 162
Cotingham's Case 128
Crossman *v.* Reg. 91

Dacre's Case 13
D'Amory's Case 9
Danford *v.* McAnulty . . 175
Davies *v.* Reg. 202
Davis *v.* Reg. 202
De Dohsé *v.* Reg. . . . 135, 178
De Lancey *v.* Reg. . . 91, 180, 203
Dellerker's Case 9
Discontinuance of Process, Case of 32
Dixon *v.* Farrer. 170
Dolyne's Case 128
Doss *v.* Secretary of State for India 43, 45

Estrateleng's Case . . . 121, 128
Eyre *v.* Reg. 135, 178

Farringdon's Case 33
Faversham's, Abbot of, Case . 128
Feather *v.* Reg. . 52, 58, 70, 89, 109, [116, 129, 133, 202
Fisher *v.* Reg. 207

	PAGE
Francis's Case	10
Frantzius's Case	109
Fitzwalter's Case	128
Frith *v.* Reg.	41, 44, 45, 49, 98
Galey's Case	121
Gardiner *v.* Reg.	204
Gibbons *v.* United States	61
Gosman, In re	79, 86, 93, 96, 153, [162, 189, 207
Grimsdale's Case	13
Grindell *v.* Reg.	211
Harcla's Case	129
Harden's Case	10
Higgs *v.* Reg.	211
Hills *v.* Reg.	210
Holmes, Re	45, 203
Irwin *v.* Gray	164
Isbister *v.* Reg.	138
James *v.* Reg.	40, 41, 76, 77, 148, [149, 161, 199
Johnson *v.* Reg.	209
Jolley *v.* Reg.	206
Jones *v.* Reg.	138
Jordan *v.* Reg.	212
Kinloch *v.* Reg.	30, 102, 135, 153
Kirk *v.* Reg.	30, 147, 162, 190, 210
Laporte *v.* Principal Officers of Artillery	37
Langford *v.* United States	61, 140
Lavers *v.* Reg.	209
Lavetot's Case	9
Lodelawe's Case	128
Macbeth *v.* Haldemund	109, 115, [131
Macleod *v.* Reg.	207
Melcombe's, Men of, Case	9
Masters *v.* Reg.	211
Mildmay's Case	20
Monck *v.* Reg.	202
Morse *v.* Reg.	212
Mowbray's Case	129
Multon's Case	13
Murray *v.* Reg.	203, 209
Myers *v.* Reg.	205, 209
Newburgh's, Abbot of, Case	9, 13
Northam Bridge Co. *v.* Reg.	94, 153, [199
O'Brien *v.* Reg.	138
Oldham *v.* Lords of the Treasury	85, [109, 115, 132
Oye's Case	9
Palk *v.* Reg.	72, 208
Palmer *v.* Reg.	202
Penn *v.* Lord Baltimore	47, 142
Percival, Executors of, *v.* Reg.	91, [180, 196, 203
Perring, Ex parte	166
Perry, Executors of, *v.* Reg.	91, 162, [203
Piper *v.* Reg.	209
Power's Case	9
Recher's Case	13
Reeve *v.* Atty.-Gen.	143
Reg. *v.* Dickson	49
—— *v.* Doutre	136, 138
—— *v.* McFarlane	59
—— *v.* McLean	139
—— *v.* McLeod	60
—— *v.* Robinson	138
Regent's Canal Co. *v.* Reg.	212
Reiner *v.* Marquis of Salisbury	42
Rolt *v.* Reg.	201
——, Re	29, 41, 161
Royal Mail Co. *v.* Reg.	203
Rustomjee *v.* Reg.	35, 98, 101, 160, [162, 175, 180, 208
Ryan *v.* Reg.	211
Ryland *v.* Reg.	49
Ryves *v.* Duke of Wellington	90, 164

PAGE

Saddler's Case 106, 107
Scott's Case 201
Seymour & Co. *v.* Reg. . . 201
Shepey's Case 12
Smith, Sundius, *v.* Reg. . . 201
Smith *v.* Upton 127
St. Livy's Case 13
Staunton's Case 13
Stump *v.* Reg. 209

Taylor *v.* Atty.-Gen. 109, 144, 161
Thomas *v.* Reg. 23, 89, 108, 110, [179, 196, 210
Tobin *v.* Reg. 4, 41, 55, 64, 69, 86, [88, 89, 109, 116, 129, 133, 160, [165, 174, 177, 181, 201
Tomline *v.* Reg. . 177, 179, 180
Toomer *v.* Reg. 210
Tucker *v.* Reg. 202
Tufnell, In re . . 150, 162, 210
Turner *v.* Reg. 209
Tyrrell *v.* Reg. 210

Warwick, Earl of, *v.* Clarence, Duchess of 112, 117
Wicks & Denis' Case . . . 73
Windsor-Annapolis Ry. Co. *v.* The Queen & Western Counties Ry. Co. 108, 136
Wood *v.* The Queen . . . 180
Wroth's Case 114
Wyke's Case 13

Year Books :—
10 Ed. 3, fol. 2 184
10 Ed. 3, fol. 26 28
13 Ed. 3 3
18 Ed. 3, 22 167
21 Ed. 3, 47 . . . 73, 89, 141
22 Ed. 3, 3, pl. 25 . . . 3
24 Ed. 3, 22 3
24 Ed. 3, 55 104
24 Ed. 3, 64 105
24 Ed. 3, 65 71
34 Ed. 3, 14 106
36 Ed. 3, 13 106
43 Ed. 3, 22 3
46 Ed. 3, H. 18 . . . 75, 167
3 Ed. 4, 24 71
4 Ed. 4, 21 . . . . 73, 105
5 Ed. 4, 118 73
9 Ed. 4, 51 . . . 71, 89, 160
13 Ed. 4, 8 . . . . . 70, 87
13 Ed. 4, 6 73
2 H. 4, 23 40
2 H. 4, 17 75
7 H. 4, 33 105
8 H. 4, 21 . . . . 75, 89
9 H. 4, 4 73
9 H. 4, 4 105
10 H. 4, 4 142
11 H. 4, 67 27
9 H. 6, 3 . . . . . 89, 119
9 H. 6, 2 79
10 H. 6, 15 75
34 H. 6, 51 88
1 H. 7, 3 87
3 H. 7, 6 160
7 H. 7, 11 79
33 H. 8 71
Yerward's Case 128

THE LAW RELATING

TO

PETITION OF RIGHT.

PART I.

CHAPTER I.

Definition and Origin of Petition of Right.

A Petition of Right is a petition presented by a subject to the Crown stating some infringement of the suppliant's legal rights by the Crown or its officers, and praying redress therefor (*a*). Definition.

The object of this work is to show for what infringements of his legal rights a subject can present such a petition, and the nature of the redress which he will obtain should he establish his claim to it, as well as the method of proceeding upon such petition.

It is necessary, however, first to say something of the origin and nature of petition of right, whence it derives its name, and by and against whom it may be employed.

The practice of proceeding against the Sovereign for the redress of injuries by a petition of right seems to owe its Origin.

(*a*) The person presenting the petition is usually called the "suppliant," the Crown "the respondent," and the answer given by the Crown "the endorsement" or "fiat."

origin to two facts of our constitution, the first being that no action of any sort or kind will lie against the Crown (*aa*), the second that the proper mode of approaching the Sovereign, for the redress of grievances or to solicit acts of grace and favour, is by petition.

Writers upon the subject have hitherto (*b*) relied upon the extinction of the right of action solely to account for the origin of petition of right as if the latter were the necessary corollary of the former; it is well, therefore, to point out whence this method of proceeding derives at least its form.

The two theories stated

Of the circumstances which led to claims against the Crown being preferred by petition of right, at least two opinions have been entertained, the first, and one that is very current, is that it is due to an express enactment of Edward I., by which it was ordained that all claims which had theretofore been brought by action against the Crown should in the future be sued by petition; the Crown, that is to say, stopped the subject's right of action against itself which had existed up to that time, and substituted for it a proceeding called a petition of right (*c*); the second opinion is that no right of action ever existed against the Crown, but that redress in such matters being a pure matter of grace or favour, had to be asked as every other favour from the Crown, by petition.

and discussed.

At this distance of time it is very difficult to determine which of these opinions is correct. The onus of proof, however, seems to be upon those who assert the existence of the right of action and enactment of Edward I.;

(*aa*) Com. Dig. Action, c. i.; Dicey's Parties to an Action, 5; Chitty's Prerog. 339.

(*b*) Chitty's Prerog. 339, note (*e*), and authorities there cited.

(*c*) Cutbill's Inquiry into the History and Nature of Petition of Right (8vo., London, Sweet, 1874); Allen's Essay on the King's Prerogative; Chitty's Prerog. 339.

we shall, therefore, state the evidence for and against this contention, and leave the reader to judge of its sufficiency.

The evidence in support of it is as follows:—

First: A statement of counsel (*arguendo*) to that effect in a case reported Y. B. 22 Ed. 3, 3, pl. 25; his words are: "In the time of King Henry (III.), and before, the king was empleaded as another man of the people would be, but king Edward his son ordained that a man should sue against the king by petition."

Secondly. A dictum of Wilby, J. (Y. B. 24 Ed. 3, 55 b), "that he had seen a writ directed 'Præcipe Henrico regi Angliæ,' in place of which is now given petition by the prerogative."

Thirdly. Another statement of counsel to that effect in a case reported Y. B. 43 Ed. 3, 22. Candish was the counsel, and he said, "Sir, in the time of King Henry the king was but as a common person, for at that time a man could have a writ of 'entry sur disseisin,' against the king and all other manner of actions as against another person."

Fourthly. Another statement of Wilby, J. (Y. B. 13 Ed. 3 Fitzherbert, tit. Brief, 260), that "the petition is the petitioner's original writ against the king."

The evidence against it is as follows:—

First. That no such writ has yet been found.

Secondly. That no such enactment of Edward I. has yet been found.

Thirdly. The adverse statements of text writers.

Bracton, in treating of the assize of novel disseisin (temp. H. 3), expressly says: "If the ejector be a prince or a king or another who has no superior unless the Lord, there will be no remedy against

him by an assize, on the contrary there will only be place for a *supplication* that he will correct and amend his deed" (2 Bk. 3).

Broke (temp. Eliz.) appends to the two dicta of Wilby given above the following comments: "Quære de tel brief, car videtur quod nunquam fuit lex car le roy ne poet escrier ne command luy mesme" (Abridgment, tit. Pet. 12), and "Quod nota et quære comment car le proces sera nomine regis, quod ne poet estre vers luy mesme" (ibid. tit. Prærog. 2) (*d*).

Staunford, Prerog. Regis (1573), gives his opinion to the same effect. "Howbeit" (saving reformation of these books, *i.e.*, the dicta of Wilby's above quoted), "I think the law was never so that a man should have any such action against the king" (cap. 15, fol. 42).

Fourthly. The improbability of such being the case considering the state of the law at the time.

(*a.*) "It is not probable that the subject would have a defined right to a writ against the king when the rights between subject and subject and the writs for enforcing them were in an unsettled state (per Willes, J., *Tobin* v. *Reg.* 16 C. B. N. S. 310; 33 L. J. C. P. 199); or,

(*b.*) That the king should if necessary have to wage his battle as an ordinary subject.

With this statement of the case we propose to leave the decision to the reader.

Origin of the right of petitioning the Crown.

Both these theories, however, presuppose a right of approaching the Sovereign by petition, and it may be asked

(*d*) A further illustration of this principle appears in the fact that the king could never be vouched to warranty in a real action, because a writ of voucher could not run against him.

whence the subject derives this right. It is difficult to say; but possibly it may be derived from the right which we find existing at the time of the Anglo-Saxon kings, of appealing to the Sovereign upon any grievance which arose from a defect of justice in the local tribunals (*e*); evidence of which we find in the laws regulating such appeals (*f*).

(*e*) Palgrave's Rise and Progress of the English Commonwealth, vol. i., chap. ix., pp. 278–283.

(*f*) Ancient Laws of England, Record Commissioners, 1840; Laws of Edgar II., § 3; of Canute II., § 17; of William I., § 43; of Henry I., §§ 34–36; Palgrave's Original Authority of King's Council, p. 10; Rise and Progress of the English Commonwealth, vol. i., chap. ix., p. 278, *seq.*

CHAPTER II.

Sketch of the History and Development of the Uses of Petition of Right.

In the last chapter an attempt was made to show the origin of petition of right; in the present one its history and the development of its uses are briefly sketched, beginning with the former.

Petitions in Parliament.

As all such petitions were presented to the king in Parliament it becomes necessary to turn to the records or Rolls of Parliament in order to learn their history (*a*).

A perusal of the earliest of these Rolls is, however, in a sense disappointing, not from any lack of material, the hearing, determining, and answering of petitions forming a very considerable portion of the business there recorded, but because it is impossible to find petition of right existing, as it now does, as a thing apart and distinct, a peculiar kind of proceeding allocated to a particular species of claim, and the sole possessor of the title which it now bears, but it is found merely occupying a scarcely distinguishable place amongst a mass of petitions, which might equally well be so called, presented to the king or king in council (*b*).

The truth is that at the time of which we are speaking

(*a*) Rolls of Parliament cited throughout from the "Rotuli Parliamentorum" (London, 1765), and in this chapter by volume and page without more.

(*b*) "All parliamentary petitions, whether of the prelates, peers, commons or individuals, until the reign of Henry V., were addressed generally to the king conjointly with the council" (Palgrave's King's Council, p. 21).

(*i.e.*, from the reign of Edward I. to the reign of Richard II.), proceedings upon petition to the king in Parliament were exceedingly common, and a large proportion of the business of the country, which has since been diverted into other channels, was thus disposed of. This was caused by the absence of many of the State Departments which we now have, and the imperfect jurisdiction of those, such as the Court of Exchequer and Bench of Judges, which then existed. Added to this, Parliament was a judicial as well as a legislative body, whose session was not only the term time of the king's council but also the proper season for the king to answer applications to his grace and favour. All these circumstances tended to the accumulation of business.

Contents of.

Hence, when we come to examine the Rolls of Parliament, we are overcome with the multiplicity and variety of the petitions. Here we find soldiers praying for their wages, outlaws for a reversal of their sentences, city companies for charters, corporations for explanation of their charters, suppliants for forfeited lands, felons for restitution of their property, suitors for speedy justice, sailors against French piracies, and lords for franchises (*c*). All these and a host of similar applications are made by petition addressed to the king or the king in council, and all are answered in very similar terms, and dealt with upon similar principles. Amongst them are doubtless some preferring such claims as would entitle them at the present day to be ranked as petitions of right, but they do not appear to differ either in name, form, or the method in which they are dealt with from the other petitions in whose company they stand.

Some "of right."

How answered.

Speaking generally, the method of answering all these petitions was the same; they were referred, namely, to some tribunal to investigate and dispose of, an answer to this

(*c*) This summary is taken from Elsynge on Parliaments, p. 274 (ed. 1768), where the references to the Rolls will be found.

effect being endorsed upon each petition (*d*). Of course many did not require to be referred, being refused (*e*), and others were petitions for "liberates," of which we shall speak hereafter, or mere complaints of grievances not requiring any judicial investigation, and to these the foregoing statement does not apply; the bulk of them, however, were applications based upon special circumstances for grants of something which the king or Parliament had it in their power to bestow, and the method which the king and Parliament adopted of sifting the suppliant's grounds of claim was as we have mentioned.

The reasons which operated to induce Parliament to refer these matters to some other tribunal, rather than deal with them itself, are not difficult to guess. They are to be found in the inadequate constitution of Parliament for such inquiries, the large draught upon public time which they would have required, and the impossibility of satisfactorily conducting them at the distance at which Parliament must have frequently found itself from the persons and things affected by its decision.

Referred

There was no fixed tribunal to which these petitions were referred; if they contained matters of which any existing Court could take cognizance, they were referred to such Court; if not, they were referred to some body—composed probably of persons who happened to be conversant with the subject of the petition—specially commissioned to inquire into the matter (*f*); but, in looking over the

*** Volumes and pages alone refer to the Rolls of Parliament.

(*d*) Compare with this practice that of granting special commissions of oyer and terminer (Palgrave's King's Council, p. 27).

(*e*) 18 Ed. 1, No. 13, vol. i., p. 46. *Answer*: "Nondum injuriatum est conqueratur post injuriam:—Ibid. No. 71; ibid. p. 51. *Answer:* Rex nichil facere potest;—15 and 16 Ed. 2, No. 37, vol. i., p. 394. "Injusta est Peticio ideo non potest fieri."

(*f*) They are usually called in the answer thus: Assignentur *fideles et sufficientes* ad inquirend' de contentis in Peticione."

answers given to petitions, we cannot fail to notice a great and very proper tendency in Parliament towards making use of the existing tribunals and forms of law wherever possible, and limiting the power of special commissioners to investigation.

either to ordinary

Thus, if the petition touched the revenue, or was a matter of account between the suppliant and the Crown, it was referred to the Treasurer and Barons of the Exchequer (*g*); if a pure matter of law, to the ordinary legal tribunals (*h*); if a matter of local custom, to the local tribunal (*i*); if a matter of equity, to the Chancellor (*k*); if of forestry, to the justice of the forest (*l*); if, however, it touched a matter which had no appropriate existing tribunal, a special one was created (*m*).

(*g*) 8 Ed. 2, Pet. No. 122, vol. i., p. 317: To the men of Melcombe, complaining of the loss to the king's revenue by the removal of their custom-house, Responsum est: "Mittatur ista Petitio ad Scaccarium et mandetur Thes' et Baronibus quod faciant in præmissis quod pro commodo Regis fore viderint faciend'." 8 Ed. 2, Pet. No. 157, vol. i., p. 321: To the petition of Richard D'Amory, sheriff, claiming an allowance, Responsum est: "Mittatur & et mandetur & quod super contenti in peticione fac' justiciam."

(*h*) 6 Ed. 1, No. 22, vol. i., p. 5: To the Petition of Thomas Lavetot. Ita Responsum est: "Perquirat per legem. 6 Ed. 1, No. 39, vol. i., p. 9: To Alicia de Bello Campo, Ita Responsum est: "Eat coram justiciariis de Banco." 15 & 16 Ed. 2, No. 136, vol. i., p. 410: To Robert Power, Ita Responsum est: "Adeat legem communem."

(*i*) 8 Ed. 2, No. 115, vol. i., p. 316: To Robert de Oye of Dover, Responsum est: "Mittatur ista Petitio custodi quinq.: Portuum et mandetur ei quod audita querela ipsius Roberti super contentis tunc fac' sibi justitiam secundum legem et consuetudinem Portuum prædictorum.

(*k*) 8 Ed. 2, No. 157, vol. i., p. 322: To the Petition of the Abbot and Convent of Cirencester, Responsum est: "Habeat breve in Cancellaria versus Episcopum et ballivos suos secundum casum suum." 14 Ed. 2, No. 83, vol. i., p. 380: To the Petition of the Prior and Convent of Novo loco in Shire wood, Ita responsum est: "Videatur Inquisitio et si sit sufficiens sicut supponitur fiat ei justicia in Cancellaria."

(*l*) "Annis Incertis," Ed. 3, No. 65, vol. ii., p. 389: To the Petition of John Dellerker. "Soit maunde a justice de la Forest d'enquere sur les choses contenuz en la Peticion;" 18 Ed. 1, No. 3, vol. i., p. 46.

(*m*) 6 Ed. 3, No. 69, vol. ii., p. 390: To the Petition of the Com-

or special tribunal.

Where a special tribunal was created the commission therefor issued under the Great Seal from the Chancery or office of the Chancellor, which, as we know, always accompanied the king wherever he went (*n*); the warrant for the issue thereof being the direction endorsed by way of answer upon the petition (*o*).

The words of the commission probably followed the words of the endorsement, in which case it would be in no particular form, but consist of a simple direction to the persons named to investigate the suppliant's claim, and to do what "reason," "justice," "right," "law" or "good faith" demanded (*p*). Such was the usual answer or endorsement not only to such petitions as would now be called "of right," but also in other cases. It is difficult at this distance of time to estimate what the exact value or propriety of this direction to do "justice," "right," "reason," &c., in the matter was, or whether any different result followed according as one or other of the expressions was used, though Lord Somers

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monalty of Bonland "Soient certaines gentz assignez d'oier et t'miner pur le Roy, &c. 35 Ed. 1, No. 7, vol. i., p. 193: To the Petition of John Francis, Ita responsum est: Mandetur Waltero de Gloucestria et Willielmo de Harden quod inquirant & et super hoc certificent Regem, &c.; and see also 35 Ed. 1, No. 36, vol. i., p. 196; 35 Ed. 1, No. 68, vol. i., p. 202; 35 Ed. 1, No. 70, vol. i., p. 203; 33 Ed. 1, No. 102, vol. i., p. 171; 8 Ed. 2, No. 207, vol. i., p. 330; 15 & 16 Ed. 2, No. 48. "Soient assignetz bones gentz d'enquere la vite and retne en Chanc' et fait dreit;" 15 & 16 Ed. 2, No. 65, vol. i., p. 399. "Seit le Roy certifie sur la cause & en Chanc' et illoeq' fait dreit;" 15 & 16 Ed. 2, No. 84, vol. i., p. 402.

(*n*) "When the king travelled he was followed by the chancellor, masters, clerks and records. On these occasions it was usual to require a strong horse, able to carry the rolls, from some religious house bound to furnish it" (Palgrave's King's Council, p. 14).

(*o*) "After the petition is endorsed, it shall be delivered to the Chancellor of England, and then shall there be a commission awarded out of the Chancery" (Staunford's Prerog., cap. xxii., p. 72 b).

(*p*) See the answer to the petitions in vols. i. and ii. of the Rolls of Parliament, *passim*.

fancied he noticed (*q*) that the direction to do right (*droit*) was never given in cases of petition touching the revenue; if, however, we may argue from results, and see what happened in consequence of such direction, then it would seem to be the corollary to the judge's or commissioner's investigations, and in the nature of a warrant for what was to be done when the investigations had ceased, viz., that the matter should receive a legal or equitable decision. If, for example, the matter upon investigation disclosed a question of title to property, and the direction was "to do what right and law demanded," it meant that the commission or tribunal to which it was referred was, if a court of law, to decide according to law, or, if not, to refer the matter to some court of law that could.

Same course with petitions of right.

Such was the general practice upon petition to the king or king in council in Parliament; the way in which it operated upon those petitions which contained claims against the Crown, and were therefore such as we now call "of right," was as follows: the initial stages were the same except that the answer had to be given by the king personally, the answer was the same in terms, viz., that certain persons should investigate and "do what was right or just;" upon this the commission issued as in other cases, but as the questions raised by such petitions, which were always for restitution of property, were always questions of the title to property, in such cases the commissioners did no more than investigate the truth of the suppliant's statement, and then handed the matter over to a court of law to be adjudicated upon after plea by the Crown (*qq*). At what

(*q*) The Banker's Case, 14 Howell's State Trials, 1, at p. 60.

(*qq*) The precise steps in this proceeding were as follows. The finding of the Commissioners was returned into the Chancery. If the allegations in the suppliant's petition were found to be true the Crown was called upon to plead, and the plea being entered the record was made up and sent to be tried into the King's Bench, and there remained until

time this practice of handing the matter over originated, it is difficult to say, but we find it existing at the time of the "Book of Assizes." (See Bro. Abr. Peticion, 17.)

Two examples.

This practice is well illustrated by two petitions, the one for lands and the other for goods taken by the king's officers, which we find recorded upon the Rolls of Parliament in the reign of Edward II., and which, being short, we give verbatim:—

The first is in these words: "A nostre Seigneur le Roy et a son Conseil pry le soen Vallat Richard de Cave, qil veille, pur l'amour de Dieu et pur le s'vice q'il ad fait, si pleisir lui soit, comaunder Brief a Rob't Destokes a deliverer la terre q'il ad seisi en la meyn n're Seigneur le Roi, sicome l'avaundit Rich^{d} fust unques nulle part encountre le Roy, et de ceo pri il a tres honourable et a son Conseil, q'il veille commaunder Brief au Viscounte de Buckyngham d'enquere la verite de ses faits et de son port. Et pur Dieu, tres honourable, veilley avoir regard a ceo qe l'Evesqe de Ely et le Seign'r de Somery et autres, tout pleyn ount testmoignez de lui sa demoer en l'isle de Ely."

Responsio: "Seit le Roi certifie sur la cause, &c., en Chanc. & illoeq. fait dreit (*r*).

The second as follows: "A nostre Seigneur le Roi et son Conseil monstre Marie de Shepey q̃ come ele fust ove Johanne q' fust la femme Monsieur Hugh de Tuilly, come Damasaille de sa Chambre, en le Chaxtel de Kenelworth, le Viscounte de Warr' vient et seisi le dit Chaxtel en la mayn n're Seigneur le Roi et prist le dit Hugh et touz les bienz en le dit Chaxtel trovetz: entre quey la ditte Marie adveit II cloches, III tapites, IIII quiltes, IIII linceux, et

judgment, for a record having "once come into the king's bench, it shall never go from thence:" if the allegations contained in the petition were not found to be true the petition abated.—Staunford's Prerogative, 77, b.

(*r*) 15 & 16 Ed. 2, No. 65, vol. i., p. 398: Richard de Cave's Case.

IIII . . . dount la dite Marie prie au dit nostre Seigneur le Roy et son Conseil la deliveraunece des bienz avaunt-ditz."

Responsio: "Seit associe ascun hom'e au Vic' d'enquere la verite de ceste chose et l'enqueste ret'ne seit fait en Chanceler'" (*s*).

Such was the old Common Law practice upon petition of right, and such it has remained up to the present day, and the question naturally suggests itself how it has happened that those petitions which contained claims against the Crown have emerged from the mass of other petitions to the unique position they now enjoy, and have appropriated to

Survival of this procedure.

(*s*) 15 & 16 Ed. 2, No. 89, vol. i., p. 402: Mary de Strepey's Case. Other instances are 15 & 16 Ed. 2, No. 98, vol. i., p. 404: Prior of Newborough's Case, claiming a rent-charge issuing out of a mill seized into the king's hand. Responsio: "Ostendat in Cancell' id quod habet de redd' et inquirat' veritas et fiat ulterius justicia. 15 & 16 Ed. 2, No. 102, vol. i., p. 405: Sir Robert de Richer Widow's Case, claiming the return of a manor seized into the king's hand, and praying "q' la verite de ceste chose seit enquise et q' droit li seit fait outre en ceste bosoigne." Responsio: "Assignent' cti' Justic' ad inquirend' veritatem facti, in p'sencia Custod' et ret'net' Inquisicio." 15 & 16 Ed. 2, No. 103, vol. i., p. 405: Margery Calviton claiming dower out of certain lands seized into the king's hands. Responsio: "Seient assignez certaines gentz d'enquere en due forme des choses contenues en ceste Peticion, et l'enqueste ret'ne seit feit dreit." 15 & 16 Ed. 2, No. 130, vol. i., p. 409: Robt. de Staunton's Case, claiming the return of lands seized by the king's escheater. Responsio: "Seit viewe l'enqueste ret'nee en Chanc' et illoq's fait drett." 18 Ed. 2, No. 30, vol. i., p. 424: William de Multon, for land seized into the king's hand, and praying "a lour Seigneur le Roy qe droit et resoun les soit fait." Responsio: "Assignantur fideles in Cancella' ad inquirend' in p'sentia Custodis & super contentis in Peticione et aliis articulis necessariis, veritatem: et retornata Inquisitione in Cancellaria, si comperiatur per eandem quod Petitio supponit tunc ulterius ibidem fiat justicia." 18 Ed. 2, No. 36, vol. i., p. 425: Robert of Grimsdale's Case; 19 Ed. 2, No. 1, vol. i., p. 431; 19 Ed. 2, No. 8, vol. i., p. 433: Hatfield Broad Oak Priory's Case; 19 Ed. 2, No. 32, vol. i., p. 438: John de Wyke's Case; 2 Ed. 3, No. 4, vol. ii., p. 14: Andrew de St. Livy Case; 2 Ed. 3, No. 41, vol. ii., p. 26: Dean and Chapter of Bangor's Case; 4 Ed. 3, No. 19, vol. ii., p. 34; Randolf de Dacre's Case, &c.

themselves both the procedure and title which, if it is derived, as we shall hereafter see it is derived, from the endorsement, was originally equally applicable to a large number of other parliamentary petitions.

Reason of survival.

The reason seems shortly to be this, all the other petitions have been transferred to and assimilated by other tribunals, or retained by Parliament upon a different basis and with an altered procedure, but that, for reasons which we shall hereafter state, petitions containing claims against the Crown never were transferred or altered, but were retained by Parliament in their original shape; and that they have gained the exclusive right to the title "petitions of right" solely by the disappearance of all the other petitions which formerly shared with them this name.

How this change was brought about appears to be as follows.

By transfer of petitions other than those "of right."

In progress of time the people seem to have abused the facilities of petitioning which were afforded them, and to have brought to Parliament many applications which could well be disposed of elsewhere. Attempts were made to litigate there claims, for which appropriate writs and remedies were already provided, and allowances asked which could quite well have been made by the Court of Exchequer. Why this should have been so it is difficult to see; possibly the sessions of Parliament, although irregular, were more frequent than the circuits of the judges, or the procedure less technical; but, from whatever cause, the fact seems to be indisputable (*t*).

It became necessary, therefore, in the interests of those who were rightfully invoking the assistance of Parliament, to put a stop to this abuse.

Some to the ordinary legal tribunals.

This was done by the aid of two statutes. First, the

(*t*) "No man who could approach the Council would content himself with the Common Law" (Palgrave's King's Council, p. 32).

Statute of Petitions (*u*), which, after reciting the grievance to the folk who come to the king in Parliament by the throng of the petitions, whereof the most part might have been despatched by the Chancellor and the Justices, provided that all petitions which touch the Seal do first come to the Chancellor, and those which touch the Exchequer do come to the Exchequer, and those which touch Justices in law of the land do come to Justices, and those which touch Jewry do come to the Jewry Justices. Secondly, the Ordinance of Petitions (*x*), which enacted that "all petitions which shall be delivered unto them whom the king has assigned to receive them, shall be at once well examined, and that those which touch Chancery be set in one, and those which touch the Exchequer in another place; and so with those which touch the Justices, and those which be before the king and his council in other places."

It is not too much to suppose that these two statutes did something to diminish the number of parliamentary petitions by transferring such petitions as were obnoxious thereto, leaving a residuum of proper applications to Parliament. But it was not so much the operation of these two statutes as the classification of this residuum, and consequent reform in procedure with regard to a great number of them, which took place about a hundred years later, which effectually placed petition of right in its present position.

Others to Parliament,

That some classification of this residuum, according as it required the attention of the king, the council, or Parliament itself, should have been made, was but natural. Accordingly, in the reign of Richard II. there appears upon the Rolls of Parliament this notice: "Quant as ditz

(*u*) 8 Ed. 1.
(*x*) 12 Ed. 1, and see Palgrave's King's Council, p. 23.

petitions et billes le Roy voet que celles que ne purront estre esploitez sanz parlement, soient esploitez en parlement, et celles que purront estre esploitez par le Conseil du Roy soient mis devant le Conseil, et celles Billes que sont de grace soient baillez au Roy mesmes" (*y*). This led to a threefold division of bills or petitions, viz. into Bills of Parliament, Bills of Council, and Bills of Grace (*z*).

Petitions containing claims against the Crown, or as we now call them "of right," were ranked amongst the last of these classes (*a*), and it is due to this circumstance

(*y*) Rot. Parl. 7 Rich. 2, No. 50, vol. iii., p. 162–3.

(*z*) Palgrave's King's Council, p. 79. It seems clear, however, that the practice of separating petitions which concerned the king, from the rest, must have prevailed before this, say as early as 6 Ed. 3, since the Rolls of Parliament for that year contain a direction how the triers of petitions are to deal with those endorsed "coram rege" (Elsynge, 277).

(*a*) The way in which this conclusion has been reached is as follows: In the first place, what we call petitions of right were originally only some of the many petitions which were sued and answered in Parliament, since (*a*) many such petitions appear upon the Rolls of Parliament, and (*b*) Staunford (Prerog. cap. xxii. fol. 72 b) shews that this practice continued to his time, when he says, "petition of right may be sued as well in the Parliament as out of the Parliament;" and see further upon this point Palgrave's King's Council, pp. 23–25. And secondly, that neither the statute nor ordinance of petitions had the effect of transferring them to other tribunals, since they are found upon the Rolls of Parliament subsequent to the respective dates of these enactments. Then upon the introduction of the notice mentioned in the text they must have been ranked as petitions of grace and favour for the following reasons:—

(1.) This class was made up of petitions which "concerned the king," see Elsynge, p. 288, and the Act of 36 Ed. 3, n. 31, cited Elsynge, p. 292, which recites, "whereas if *any petitions concern the king*, the lords assigned to hear them endorse them 'coram rege,' and so nothing is done: there could hardly be any petitions which concerned the king more nearly than those which sought to deprive him of some of his property."

(2.) If not endorsed "coram rege," then they must have been endorsed "per auctoritatem parliamenti" (Elsynge, p. 294), and proceeded with and answered in the king's absence; but the practice which has prevailed to the present day shews that

that they owe their present position. How this division of petitions operated in favour of this survival is as follows.

Although the practice and procedure upon all petitions was, as we have seen, originally the same, yet after this division a difference was introduced. "Bills of Parliament," even if they had been formerly referred, were now heard and determined in open Parliament, and the royal assent to such decision having been obtained, became what we should now call Acts of Parliament.

"Bills of Council," in which class were included all the rest of the parliamentary petitions, except those for which the personal answer of the king was requisite, were dealt with in the following way: the old procedure was entirely reformed; they no longer went before Parliament to be referred to a commission, but the council itself took the place of the commission, and with extended powers not only investigated but heard and determined them. However this hearing and determining was at first conducted, it apparently soon became usual for the council to deal with different sections of such petitions by committees of its own number; these committees became in course of time independent tribunals, the Chancellor became the head of the Court of Chancery (*b*), and such Courts as those of Privy

and to "the Council."

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nothing can be done in the matter without the express personal answer of the Sovereign given by his fiat, and that Parliament has never been able to answer such petitions.

(3.) Petitions of right are, strictly speaking, petitions of grace and favour, since the Sovereign is not legally compellable to give any fiat at all, and without it nothing can be done (*infra*, note to sect. 2 of the Act).

(4.) The supposition that petitions of right were so classified is the only one sufficient to explain the cause of their gradual removal from parliamentary control, until at the present day they are not sued in Parliament at all.

(*b*) Palgrave's King's Council, p. 94.

Council (*c*), Star Chamber (*d*), and of Requests (*e*) came into existence, and gradually assumed jurisdiction in all such cases as had formerly been committed to them, to the exclusion of the council from which they sprang; but they retained, just as the council had done, the outline of the old procedure by petition and answer.

Thus were the bulk of what had been formerly parliamentary petitions distributed amongst other tribunals, and became Acts of Parliament, suits in Equity, or proceedings in the Star Chamber, Privy Council, and Court of Requests.

Petitions "of right" not so transferred, but still addressed to the king.

But while these changes were developing themselves with regard to such of the parliamentary petitions as were "Bills of Parliament," or "Bills of Council," the position of "Bills of Grace," in which class were included those which contained claims against the Crown, remained the same as they were, unaffected by any of the foregoing statutes or orders, save that although people could, it was no longer necessary to sue them in Parliament, but they might be "baillez au Roy mesmes." An answer or endorsement, however, had still to be obtained from the king, and was still given in the old terms, and the commission still issued thereon to investigate the suppliant's title, and then hand over the matter to a court of law. This revised procedure has lasted until the present day absolutely unchanged, a genuine relic, it is submitted, of the old practice upon petition in Parliament to the king, and it is thus that petitions containing claims against the Crown became the sole possessors of the title borrowed from the endorsement, petitions "of right."

In the year 1860, however, this procedure was considered cumbersome and obsolete, and therefore an Act was passed (23 & 24 Vict. c. 34), known as Bovill's Act, which, without

(*c*) Palgrave's King's Council, pp. 97–100.
(*d*) Ibid. p. 98. (*e*) Ibid. pp. 77 and 99.

abolishing the old, introduced as an alternative a new mode of procedure, the details of which will be found in the Act itself, printed at the end of this volume. It is the practice under this new Act and not the old practice which is the subject of this work.

Such is the history of the procedure by petition of right; with a few words upon the development of its uses this chapter closes. Original use of petition of right.

In the preceding pages the statement has frequently been made, and taken for granted, that the only claims which were made against the Crown upon a petition, such as we now call "of right," were for the restitution of property. That this was so appears incontestable from an examination of the old abridgments, such as Fitzherbert's and Broke's, which, though professing to contain an accurate digest of all the cases upon petition of right, do not contain a single one in which a debt or money claim upon the Crown is recovered by this means. The time has now arrived when it should be shewn how and why this was so. To obtain restitution of specific property, but not debts or damages.

It is not that there is anything extraordinary in the necessity for some form of procedure by which property wrongfully taken by the Crown could be regained, the feudal system, with its elaborate machinery of fines, forfeitures, and escheats, sufficiently accounts for that; what is perhaps remarkable, is that the foregoing description of the uses of petition of right excludes the possibility of Crown creditors making use of it to recover their debts, although they must have been equally entitled to payment, but for different reasons. It certainly does at first sight seem surprising that a subject could recover, by this means, lands or goods when taken by the Crown, when one who had lent or paid money could not. Reason for this.

Now if this statement necessarily implied that money so

lent or paid could not be recovered at all, surprise would give place to incredulity, but it does not. Such money could be recovered; but after a certain period in our history it seems clear that it was not recovered by such petition, as we now call "of right." This statement needs some explanation.

Other existing remedies for recovery of debts.

To understand how and why this was so, it is necessary to remember that in the early days of our history the "treasure" of the country was literally the king's treasure, it was kept in his house or palace (*f*), and in the custody of his officer (*g*), and that later, though the place where it was kept was changed and the officers who had control over it multiplied, it still remained what it was originally, the king's treasure both in theory and in fact; of which there is no better evidence than the circumstance that the king was the only person in the country who could give a valid warrant for disbursing any of it (*h*). Secondly, that this treasure had its own appropriate staff of officials, viz., the Treasurer, Chamberlains, and Barons of the Exchequer, to take charge of and investigate all claims which were made upon it.

Bearing these two facts in mind, it would not be unnatural to suppose that the payment of debts due from the Crown was obtained by some procedure only addressed to the person authorized to issue, and the officials conversant with the mode of issuing the public money, and that if suit by

(*f*) Madox Ex., vol. i., p. 154; Stubbs, Constit. Hist., vol. i., p. 428.

(*g*) Thesaurarius regis, ibid.

(*h*) "The law has entrusted the king himself only with his treasure when once it comes into his coffers, which is the receipt; and only he or such as are empowered by warrant can dispose of it; no Court has anything to do with it." Per Lord Somers in the Banker's Case, 14 Howell's State Trials, at p. 68. "It was resolved in Sir Walter Mildmay's case that no officer of the king, nor all of them together, can issue out or dispose of the king's treasure *ex officio*, though it be for his honour or profit, unless by a warrant from himself" (Coke, 11 Rep. 91 b).

petition of right was ever applicable to this purpose, it would eventually be superseded by some more special form of process.

Now there seems some reason for doubting whether a petition of right, *i.e.*, one endorsed "soit droit fait aux parties" was ever applicable to this purpose. Lord Somers himself, after an exhaustive search through the original petitions then known, and a thorough study of Ryley's 'Placita Parliamentaria,' says that "as the endorsements upon petitions of right were various according to the nature of the case, so above all others they were different in cases belonging to the revenue; and," he continues, "I think there is not an instance to be found where such petitions were answered 'soit droit fait aux parties'" (*i*). But, whether originally appropriate or not, it seems to have been abandoned for some more special form of proceeding.

This special form seems to have been as follows. The petition was still presented in Parliament, and the king still answered it, either by paying the claim outright or referring the matter to the Exchequer.

By petition for a "liberate."

If the claim was paid outright, then the petition was answered in some such terms as the following: "Fiat breve de Cancellaria de liberate thesaurario et camerariis quod liberent supplicanti tantam summam." Upon this a writ of "liberate" (*k*), namely, the special writ under which the Exchequer officials were authorized to disburse money, issued for the amount under the Great Seal in favour of the suppliant. Instances of this course of proceeding are Aynesham's Case (*l*) and Estretelyng's Case (*m*), the former of whom presented his petition for work done and materials

(*i*) The Banker's Case, 14 Howell's State Trials, at p. 60.
(*k*) 4 Inst. p. 116; Madox Ex., vol. i., p. 390.
(*l*) Ryley's 'Placita Parliamentaria,' p. 251.
(*m*) Ibid. p. 251.

provided for the repair of Carnarvon Castle—the latter for money laid out in the king's service.

If the matter was referred to the Exchequer, then the petition was answered in some such terms as the following: "Mandetur ista peticio thesaurario et baronibus de scaccario et sequatur coram eis" (*n*), or "Fiat breve de Thesaurario et Baronibus de Scaccario quod auditis querentis rationibus & si necesse fuerit satisfaciant eis de & si que &" (*o*), in which case the Treasurer and Barons heard and determined the matter, and if it was necessary to pay the suppliant anything, the endorsement on the petition was sufficient warrant therefor (*p*).

It must not be supposed that this variation in the form of the endorsement was a mere question of words, on the contrary it corresponded with a substantial difference in the form of procedure; for example, upon such endorsements there was no delivery of the petition to the Chancellor, no assignment of "fideles et sufficientes" out of the Chancery to try the truth of the suppliant's title, no return of their finding into the Chancery "and doing of right" thereon, but the matter was sent straight to the Exchequer and there heard and determined, such petitions not being petitions of right—that is to say, they were not treated as such.

Difference between petition "of right" and for "liberate."

There being, therefore, a special procedure for the payment of debts, the procedure by petition of right was limited to cases in which property was sought to be recovered from

(*n*) Ryley's 'Placita Parliamentaria,' p. 408.

(*o*) 35 Ed. 1, No. 28, vol. i., p. 195.

(*p*) Lord Somers enumerates amongst the authorities under which the Barons can pay money out of the Exchequer, "cases where they have acted by virtue of the king's answer indorsed upon petitions made to him in Parliament, which answers to such petitions generally order a writ to issue out of the Chancery which gave a jurisdiction to the Treasurer and Barons respectively, to act according to the effect of the answer" (The Banker's Case, 14 Howell's State Trials at p. 47).

the Crown, and became allocated to that particular species of claim. That this was the single use of such petitions up to the reign of Queen Elizabeth, a reference to the cases collected in Broke's 'Abridgment' will show, and an examination of the Reports from that reign to the year 1874 gives a like result.

In the year 1874, however, the Court of Queen's Bench—whether rightly or wrongly we will not now stop to consider (*q*)—held (*r*) petition of right applicable to cases of contracts, and that unliquidated damages and *à fortiori* debts could be recovered from the Crown by this means, since which decision it has been very freely applied to this purpose, and its use therefore very much extended.

With this account of the history and development of the uses of petition of right we pass to a consideration of the mode in which it has acquired its present title.

(*q*) The whole of this question will be found discussed in Chapter 10, *infra*.

(*r*) *Thomas* v. *Reg.* L. R. 10 Q. B. 31; 44 L. J. Q. B. 9; 31 L. T. 439; 23 W. R. 176.

CHAPTER III.

WHY A PETITION OF RIGHT IS SO CALLED.

Staunford's derivation.

VARIOUS explanations have from time to time been given of the reason why petitions of right are so called, the most universally accepted one being perhaps that given by Staunford, viz., "that it is so called because of the right the subject hath against the king by the order of his laws to the thing he sueth for" (*a*), the prayer of it being grantable "ex debito justitiæ" (*b*); but there are reasons for not accepting this derivation.

Objections to.

In the first place it is extremely doubtful if the subject has or ever had any "right," in the strict legal sense of the word, "to the thing he sueth for," even if his claim be well founded.

Strictly speaking, a man would hardly be said to have a right to a thing unless he could recover by action it or its value from any one who deprived him of it, unless he had, that is to say, a "jus persequendi in judicio quod sibi debetur" (*c*); but where the Crown is concerned it is perfectly certain that he has no such right, it being the absence of this right that has called the proceedings by petition into existence; and when it is said that the prayer of it is grantable "ex debito justitiæ," we should remember what a famous judge said (*d*) in answer to such a contention,

(*a*) Staunford's Prerog. cap. xxii. fol. 73.
(*b*) Chitty's Prerog. p. 345; Broom's Legal Maxims, edit. 1884, p. 53.
(*c*) Coke Litt. p. 285 a.
(*d*) Per Maule, J., in Baron de Bode's Case, 13 Q. B., note at p. 387.

viz., "that neither the Queen's Bench or any other court of law administered justice in general, and that if the suppliant's claim was not cognizable by the Queen's Bench as a claim in law, it might be that the Court had no power to give any judgment at all."

Having no right "persequendi in judicio quod sibi debetur" by action, has he any by petition? His strict right in this quarter seems limited to the presentation of it: he cannot proceed therein without the Crown's fiat, and there is no authority showing that the Crown is compellable to grant it (*e*).

The true derivation suggested.

But in the second place, even supposing the suppliant had a "right to the thing he sueth for," this would only be discovered when the proceeding was at an end. This derivation, therefore, presupposes a decision in the suppliant's favour.

The true derivation is not far to seek. From a knowledge of the way in which various writs and proceedings in English Courts have been named we should expect to find the petition called after some dominant word or words occurring in the body of the document which compendiously describes the substance of the process, "as for the most part writs are" (*f*). Thus we have our writs of "right," actions of "qui tam" and "assumpsit," and writs of "fi. fa.," "certiorari," "extendi facias," "subpœna," and others too numerous to mention.

The title petition "de droit" or "of right" has no doubt been acquired in the same way, and simply means a petition endorsed "soit droit fait als parties." At the time of Staunford it was known as "petition de droit." At that time he tells us that the "general conclusion" of such a petition was "que le roy lui face droit et reason," and that the endorsement upon such a general conclusion was "soit droit fait as

(*e*) See the discussion of this subject in notes to sect. 2 of the Act.
(*f*) 4 Inst. p. 116.

parties" (*g*). The Rolls of Parliament shew us that this practice had existed previously to his time, and the endorsement is the same at the present day, "right" being of course the translation of "droit." The reason why the suppliant's prayer was for "droit" or "right" possibly was because his claim to approach the king was that he had failed to obtain "right" elsewhere (*h*).

This question of the origin of the name "petition of right," unimportant as it may seem, is of material use when we come to consider how far petitions otherwise endorsed can ever have been in the strict sense of the word "petitions of right," as by some writers they have been held to be.

(*g*) Prerog. cap. xxii. fol. 73.

(*h*) Palgrave's Rise and Progress of the English Commonwealth, vol. i. p. 283.

CHAPTER IV.

To whom a Petition of Right lies.

To be sued by petition appears to be the special prerogative of the Sovereign, and one which does not extend to his or her consort or family. The Sovereign,

Thus Staunford says (*a*): "And note that suit by petition can be to no other than only to the king, for no such suit shall be made to the Queen or to the Lord Prince, for these have no such prerogative."

He gives two cases as his authorities; the first is as follows: An ancestor of the "Count of Suffolk" having forfeited certain lands and rents to the Crown, the king granted them by letters patent to the Queen, but the forfeiture having been reversed, the "Count of Suffolk" brought "scire facias" against the Queen to repeal the letters patent. *Norton*: Madame le Roygne tient ceux tenements come sa dower, en droit le Roy et sa possession en ley est le possession le Roy, issent duisses en cest case aver sue a Roy per peticion et nient cest breve vers le Roygne. *Gascoigne:* Ou veistes (did you see) unques le Roygne aver tiel prerogative, que suit per peticion serra fait a luy? *Norton:* Ieo ne ple a tiel entent que le suit serra fait al Roygne, mes al Roy. *Thorning:* Tout temps ad Præcipe quod reddat gise vers le Roygne et auters manners des breves, car et est person exempt nient obstant le coverture. The Court, however, but not the consort or the princes.

(*a*) Prerog. cap. 22, fol. 76; Com. Dig. Prerog. D. 79.
(*b*) 11 Hen. 4, 67.

gave judgment for the Queen, on the ground that the plaintiff should have brought his "assize" and not "scire facias."

The second is in these words: "Brief de dower fuit port vers Isabel Roygne d'Engleterre mere nostre seygnior le Roy que ore est: *Parning*, El est person de dignitie et ne entendomus que suit serra fait vers lui mes par peticion, par que judgement sil doit remainder: et le demandant, dixit gratis que il voile un continuance tanque a auter jour de emparler ove le counsel la dame en le mesne temps: *Parning* ne voilomus continuance: *Stonham*, non par cas il ne serra a faire mes sur vostre challenge poiomus bien done jour, tanque a tiel jour prece petentis et ita fuit et credo quod Parning eschua la continuance pur l'accepter le partie respondable (*c*).

Can the King be joined with a subject?

The present seems the proper place to discuss the question which has recently arisen, viz. whether a subject can be sued jointly with the Crown upon a petition of right.

An examination of the earlier cases upon petition of right does not shew that the subject could be made co-respondent with the Crown at any stage of the proceedings, but that where the Crown and the subject are both implicated in withholding property, each is proceeded against by the appropriate remedy—the King, that is to say by petition, and the subject by "scire facias" or assize (*d*). This is what might

The old practice.

(*c*) P. 10 Ed. 3, fol. 26; Fitzherbert, tit. Peticion.

(*d*) Staunford's Prerog. cap. xxiii., fol. 76 a: "Then further let us see where he that sueth by petition shall sue a 'scire facias' and where not. And as to that, it is a general rule that if the king hath granted the wardship of the lands over for a term certain, he that sueth his petition must sue a 'scire facias' against the king's patentee in such case," &c., and cases there cited and cap. xxii., fol. 74 b. "When his highness seiseth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is mine assize renewed."

have been expected when we consider how inappropriate proceedings are where the subject is defendant, and there appears good reason why it should be so. These early cases were petitions for the restitution of property (chiefly real). The king and a subject, therefore, would not be made co-respondents unless they were joint tenants; but the king and a subject cannot be joint tenants (*e*), and so the occasion for proceeding against them jointly did not arise.

The modern practice, (1) before the Act of 1860.

Upon the revival of this method of proceeding in recent years some inconvenience appears to have arisen from this restriction upon the subject's right of suing, and a plan to have been devised to remove it, which was as follows. In cases where a subject sought relief against the Crown and others, a petition of right was presented by the suppliant to the Crown alone, concluding with a special prayer that the subject might be allowed to sue the Crown either personally, by petition, or in the person of the Attorney-General by ordinary suit, joining any other persons that might be necessary. Upon this prayer being acceded to, if it became necessary to join other parties with the Crown, the suppliant abandoned his petition, and commenced and prosecuted an ordinary suit against the Attorney-General and such other persons (*f*), if not he continued by petition. However, although

(*e*) See Cruise's Digest, vol. ii., p. 372 (ed. 1835): "All natural persons may be joint tenants, but bodies politic or corporate cannot be joint tenants with each other. Nor can the king or a corporation, whether sole or aggregate, be joint tenants with a natural person (p. 373). If lands be given to the king and to a subject to have and to hold to them and to their heirs, yet they are not joint tenants, for the king is not seised in his natural capacity, but in his royal and political capacity, *jure coronæ*, which cannot stand in jointure with the seisin of a subject in his natural capacity" (quoting Coke, 1 Inst. 190 a).

(*f*) See *Clayton* v. *Attorney-Gen.*, 3 C. P. Cooper, 97; *Re Rolt*, 4 D. & J. 44; *Canterbury* v. *Reg.*, 1 Phillips, 306; 12 L. J. (Ch.) 281; 7 Jur. 224; The Baron de Bode's Case, 8 Q. B. 208; 10 Jur. 208.

this practice was recognized, it was never regarded as any authority for joining a subject with the Crown upon the petition of right itself. Thus Vice-Chancellor Wickens, in a recent case, although he quoted the above practice with approval, said. "Before the Petition of Right Act (23 & 24 Vict. c. 34) the petition was addressed to the Queen alone: . . . . on a petition of right proper before the Act a subject could not have been joined with the Crown . . . . It seems to me there is nothing which in the least authorizes the joining of a subject with the Queen as respondent to the petition itself." (*g*)

(2) Since the Act of 1860.

Subject to what is stated in the next paragraph, there appears to be nothing in the Petitions of Right Act (23 & 24 Vict. c. 34), 1860, which authorizes the joinder of a subject with the Crown. It appears to have been done, however, in at least two cases since the Act. The first of these is *Kirk* v. *Reg.* (*h*). There the suppliant, in proceeding against the Crown for a breach of contract, joined an officer of engineers, by whom he alleged the breach had been caused, and claimed against him an injunction and the costs of the suit. As the case was decided upon other grounds, it became unnecessary to consider whether this was such a misjoinder of parties as would have been fatal to the suppliant's success; but the Vice-Chancellor intimated that, if the officer had not put in an answer, but taken the objection in a proper manner, it would probably have been upheld. The second case was that of *Kinloch* v. *Reg.* (*i*), in which no objection seems to have been taken on behalf of the respondents, but which, like the previous case, failed upon the merits.

Third parties under the Act of 1860.

It should be noticed, however, that the Act provides for bringing in a third party as a defendant to the petition in

(*g*) *Kirk* v. *Reg.* L. R. 14 Eq. 558, at p. 563.
(*h*) L. R. 14 Eq. 558.
(*i*) Weekly Notes, 1882, p. 164; Ibid. 1884, p. 80.

a certain event, which is, shortly, where the petition is for the restitution of property which has been granted away or disposed of by the Crown to a third party, such third party may be brought in to defend. These cases and the procedure thereunder will be discussed in the notes to the sections of the Act dealing with the question. (*k*)

Does the petition abate by the death of the Sovereign.

A further question, however, may arise after the suit has been begun, which is, whether it abates upon the Sovereign's death, or continues against his or her successors or executors.

Unfortunately there appears to be no authority upon this point other than the case of *Viscount Canterbury* v. *Reg.* (*l*), in which it was sought to make the present Queen liable upon a petition of right for a wrong done by a servant in the employ of William IV.; and though Lord Lyndhurst, in his judgment therein, deals with the question, he does not do so on principles which make it available in other cases (*m*).

(*k*) 23 & 24 Vict. c. 34, s. 5.

(*l*) 12 L. J. Ch. 381; 1 Phillips, 306; 7 Jur. 224.

(*m*) Lord Lyndhurst's line of argument is that the petition being in the nature of an action of tort is obnoxious to the rule "actio personalis moritur cum persona." It was in the same case decided, and has since been established, that no petition of right lies for a tort. His words are as follows: "Another objection has been urged against the claim of the petitioner. If the case were one between subject and subject, this objection would be fatal, and it is admitted on the part of the petitioner that he can only expect success if he had a right to redress in an action against a private individual. Now the cause of action arose in the time of the late king, and it is clear that had this been a case between subject and subject an action could not be supported on the principle that 'actio personalis moritur cum persona.' It is contended that a different rule prevails where the Sovereign is a party; but some authority should be adduced for such a distinction. It is true, indeed, that the king never dies: the demise is immediately followed by the succession; there is no interval, the Sovereign always exists; the person is only changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants, if indeed such responsibility exists, to be charged on the successor, ceasing as it does altogether in the case of a

Neither is this matter dealt with in the Petitions of Right Act, 1860, except under the general direction (*n*) that the practice upon petitions shall be as far as possible assimilated to suits between subjects; but as this direction is qualified by a proviso whereby all existing prerogatives of the Crown in such matters are preserved, it becomes necessary to see if any such prerogative exists upon this point.

Common Law doctrine of abatement modified by 1 Ed. 6, c. 7.

1 Anne 1, c. 8.

At the Common Law all legal process appears to have discontinued by the death of the king (*o*). To remedy this inconvenience two statutes were passed, one in the reign of Edward VI. (*p*), the other in the reign of Anne (*q*). By the former, actions, &c., between subjects, by the latter, actions, &c., by the Crown against subjects, were kept alive, notwithstanding the demise of the Crown. Petitions of Right do not seem to be within either of these statutes (*r*), and therefore there seems to be no statutory authority to prevent process in such suits from discontinuing if they are obnoxious to the ordinary Common Law rule.

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private individual? In the case of a subject the liability does not continue in respect of the estate; it devolves on neither the heirs nor the personal representative: it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence, that the liability continued, and was transferred to the successor, unless some distinct authority was shewn in support of such a doctrine. Several cases were referred to for this purpose in the argument at the bar, but they were cases of grant, covenant, debt, or relating to the right of property in which, from the analogy to the case of a subject, the Crown might be liable in respect of succession, and do not, I think, sufficiently establish the principle for which they were cited."

(*n*) 23 & 24 Vict. c. 34, s. 7.

(*o*) Com. Dig. tit. Abatement, H. 38, i.; 7 Rep. 29 b–30 a.

(*p*) 1 Ed. 6, c. 7.

(*q*) 1 Anne, st. 1, c. 8.

(*r*) As to the former, see "The Case of Discontinuance of Process, &c., by the Death of the Queen," 7 Rep. 30 b; as to the latter, see the words of the statute.

To decide whether they are or are not is extremely difficult. In the first place the law seems to have recognized a sort of duality in the person of the Sovereign, a "generic" existence as King of England and an "individual" existence as Henry or Edward, King of England. In the former capacity he was supposed not to die, in the latter he was (*s*). The law further seems to have considered that he was party to a suit in his individual capacity, and that consequently, upon his death, process therein was as far as possible discontinued or abated. Thus an original writ sued out by him abated, and so all proceedings upon an information or an indictment (*t*). But the operation of this rule seems to have been rather counteracted by the operation of another, viz., "that records cannot abate" (*u*), and therefore so much of the proceedings as were of record continued, and the other party could be reattached to plead thereto "de novo." Thus, though the proceedings on the information were discontinued, the information being recorded in the Exchequer remained (*x*), and similarly of indictments.

It is not easy to apply these rules to a petition of right under the Act of 1860. Formerly the proceedings therein appear to have been of record when the finding of the commission had been returned into the Chancery, the Crown had pleaded thereto, and the record made up and sent into the King's Bench to be tried (*y*). Whether the filing of the petition of right at the central office under the

(*s*) "For although it is true that the king 'in genere' doth not die, for there is no interregnum, yet, 'in hoc individuo' Henry the King and Edward the King, &c., he dies," 7 Rep. 31 a.

(*t*) 7 Rep. 31 a. (*u*) Ibid.

(*x*) Upon this point see Lionell Farringdon's Case, Cro. Car. 10, and the "Memorandum" of the judges, Cro. Jac. 14.

(*y*) This appears to have been so in the case of "monstrans de droit," according to a case quoted (Pasch. I. Ed. 5), by Coke, 7 Rep. 31 a, which unfortunately I have been unable to find.

present practice (*z*) makes it a record of the Court, has not been decided.

A convenient course for the Court to pursue under the present Act would be, it is suggested, to let all such petitions as are brought against the Sovereign in his or her individual capacity abate, but those to which he or she is the mere nominal defendant for the public continue.

(*z*) Central Office Practice Rules, 1880–1882, A.

CHAPTER V.

Who may sue by Petition of Right.

It would seem that all subjects of the Crown entitled to and governed by the Common Law of England may present a petition of right, but whether an alien can, except in one case which we shall next mention, seems doubtful. A subject's right of approaching the Crown for this purpose is now well established by usage, whatever its origin may have been, but there seems no authority extending this privilege to aliens. The allegation, therefore, which is found in some petitions, viz., that the suppliant is a British subject, may be material (*a*). Subjects governed by the Common Law.

There is, however, one instance in which an alien may possibly be allowed to present a petition, which is as follows: By a recent "Act to Amend the Law with respect to the Transfer of Stock forming part of the Public Debt of any Colony, and the Stamp Duty on such Transfer," it is enacted (*b*) "That any person claiming to be interested in colonial stock to which this Act applies, or in any dividend thereon, may present a petition of right in England in relation to such stock or dividend, and the like proceedings may be had upon such petition as in the case of any other petition of right," subject, however, to this qualification, that in the event of the suppliant succeeding, the Colony, and not the Treasury, must satisfy the claim. It will be

(*a*) *Rustomjee* v. *Reg.* L. R. 1 Q. B. D. 487; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428.

(*b*) 40 & 41 Vict. c. 59, s. 20.

noticed that the words of the enactment are "any person," not "any subject." There has been, at present, no decision upon those words.

It will be noticed that the above definition of those who may present a petition of right only includes those subjects "who are entitled to and governed by the Common Law of England." This has been done advisedly, since, whatever may be the case now, there certainly seems at one time to have been a doubt whether certain subjects of the Crown residing in colonies or dependencies could exercise this right.

The position of Colonial subjects not governed by the Common Law.

The doubt seems to have arisen in the following way:— If a dependency or colony is acquired by cession or conquest, the laws of the country existing at the time of such conquest or cession remain until altered (*c*), and the Common Law of England is of no force there; but if the colony or dependency is the result of the discovery and colonization of an uninhabited country by English subjects, then all the existing laws of England at the time of such colonization are immediately in force (*d*). Supposing, therefore, the right of presenting a petition of right is due to the Common Law of England, how can the subjects of colonies or dependencies acquired by conquest or cession claim this right unless a similar one was contained in their original constitution or has since been superadded by a competent authority?

e.g. Canada.

The case of Canada will serve for an example. This country was ceded to the English by the French in 1763, and the existing French laws were expressly retained by statute (*e*). Those laws contained no provision by which the

(*c*) Per Lord Mansfield in *Campbell* v. *Hall*, 20 St. Trials, 322–3; Broom Constit. Law, p. 48 (ed. 1885).

(*d*) Memorandum, 2 P. Williams, 75; Broom Constit. Law, p. 52 (ed. 1885), and cases there cited.

(*e*) 14 Geo. 3, c. 83, s. 8 (Colonial).

Crown could be sued; such provision has since been obtained (*f*). It is submitted that previous to obtaining it no subject could present a petition of right.

Thus a writer, in describing the position of a Canadian subject fifty years ago, when such provision was not in existence, says (*g*): "In Canada there is no relief for the subject against the Crown. The king cannot be sued in his own Courts. It is understood that by decisions of our Courts public officers cannot be sued for engagements entered into by them in their public capacity, so that really the subject may suffer without a remedy. In England there is the petition of rights (*sic*), which is decided upon in legal form. The bill introduced in 1824 by a distinguished advocate was intended to give a similar relief to the subject there. It however failed in the legislative council. The officers of the Crown are always careful to confound their own rights with those of the king himself, they studiously guard themselves from attack and control under shelter of the constitutional maxim that the king is not answerable for his conduct, and exclaim that his Majesty's dignity is insulted when their evil deeds are censured."

Laporte v. The Principal Officers of Artillery.

The inability of the subject to sue the Crown emphasized in the foregoing passage was very fully discussed recently in one of the Canadian Courts of law in the case of *Laporte* v. *The Principal Officers of Artillery* (*h*) (1857).

There the plaintiff claimed in a petitory action a declaration that he was owner and should be put in possession of certain lands: the defendants pleaded, *inter alia*, title in the Crown by prescription for over thirty years, upon which the plaintiffs joined issue. Upon the trial it was proved that previously to the year 1843 the lands in question had been

(*f*) 39 Vict. c. 27 (Canadian).
(*g*) Political and Historical Account of Lower Canada (England), 1830
(*h*) 7 Lower Canada Reports, 486.

vested in the Crown, but in that year an Act (7 Vict. c. 11, Canadian) had been passed by which they had been vested in the Board of Ordnance. Upon this the plaintiff contended that since the passing of such Act sufficient time had not elapsed to entitle the defendants by prescription, and that during the time the lands were vested in the Crown time did not run against him, for the following reason :—

There is a maxim of law to this effect, "contra non valentem agere non currit præscriptio," therefore, if he could shew that during the whole time the Crown was in possession he had no legal remedy, he would be within the maxim. It was conceded that he had no right of action, and the question was whether he was entitled to present a "petition" or "monstrans de droit." The plaintiff admitted that had the case arisen in England he would have been entitled to do so, but a Canadian subject was, he argued, in a different position. "Petition" and "monstrans de droit" were proceedings peculiar to English law taken before the Chancery and Exchequer Courts: that the system of law in Canada was French, not English, by 14 Geo. 3, c. 83, s. 8 (Colonial), and that therefore no Court existed in Canada which could take cognizance of such matters.

For the defendants, it was argued that the plaintiff might have availed himself of these ancient Common Law remedies which were open to every one of her Majesty's subjects in every portion of her dominions; and the superior court upheld this contention. But in the Court of Appeal, where however the case went off upon another point, the following judgment was delivered by Mondelet:—

"Une question bien importante a été soulevée: on a invoqué la prescription contre les appelants. Mais 'contra non valentem agere non currit præscriptio,' ou devant les Cours de Justice en ce pays, jusqu'à la 7e Vict. c. 11, il n'y

avait aucun moyen de faire valoir ses droits contre la Couronne. La pétition, the petition of rights (*sic*), monstrans ne pouvait être référée par le Souverain à nos Cours de Justice du Bas Canada, constituées comme elles le sont, et de telles réclamations n'auraient pu, ni dû être accueillies par nos Cours. Le Souverain n'avait aucun tel droit, et les juges ici aucune obligation, aucun droit de s'en saisir. Je ne connais de prérogatives que celles définies par les lois ou la constitution. Dans le principe, ce qu'on appelle prérogatives de la Couronne ont été arrâchées aux peuples par la force; et depuis Runnemède jusqu'à nos jours, ce qu'on appelle concessions sont tout simplement des restitutions. En sorte que la seule doit être la règle et dans l'espèce les appelants n'auraient eu aucun moyen de faire valoirs leur droits devant les Cours du Bas Canada. L'acte de la 7e Vict. c. 11, a opéré un changement et c'est en vertu de celle loi que les appelants se sont pourvus. Il s'ensuit que la prescription ne peut leur être opposée. En 1824 un membre distingué de la Chambre d'assemblée introduisit une loi à l'effet de donner au sujet l'exercice de ce droit contre la Couronne. Il va sans dire que le Conseil législatif du temps rejeta cette mésure."

Alwyn, J., who was the only other judge who noticed the point, was of opinion that since the cession of the country a Canadian subject had a remedy against the Crown by petition of right.

At the present time Canada and some of the other colonies possess this right of petitioning by statute, but where the right has not been so conferred, it is submitted that it is doubtful if it exists in colonies and dependencies not governed by the Common Law of England.

Can subjects sue jointly?

A further question, however, arises in connection with this portion of our subject, viz., whether, when persons are jointly interested in property taken and retained by or in a

contract made with the Crown, they must sue jointly or severally.

With regard to joint tenants of realty, the rule seems to be that each of them may sue his petition for his share, and that a plea of joint tenancy is not a good answer. Thus as early as the reign of Henry IV.: "Fuit dit per Justiciarios in Camera Scaccarii que si III jointenauntes foñt de certeine terra q̃ est seisie in manu regis, chescũ de eux aperluy poyt suer extra manus regis son parte demesne sans son compaignion et q̃ nest plee pur cesty vers q̃ est sue dallege joyntenancy" (*i*). And no doubt joint tenants can join in suing for the whole (*k*).

There is no authority which shews what the position of joint contractors is upon a petition of right, but there seems no reason why the rule subsisting between subject and subject, by which all the persons with whom the contract is made should join as plaintiffs (*l*), should not hold good where the Crown is one of the contracting parties.

Is the right of suit assignable?

Whether the right, if such it may be called, of suing a petition of right is transferable or assignable, so as to enable some one, other than the person originally entitled to sue, to be a suppliant is more difficult to say. At the outset we should distinguish all cases in which we find persons suing by petition to regain property to which they are entitled, but the possession of which the Crown has usurped in the time of their predecessors in title, since such people do not sue as assignees of their predecessors' right of suit, but in virtue of the right which accrues to themselves by the retention of their property. Thus we find in recent cases devisees of a freehold estate which had

(*i*) 2 Hen. 4, 23; Broke's Abridgment, tit. Pet. 6.

(*k*) *James* v. *The Queen*, L. R. 17 Eq. 502; 43 L. J. Ch. 754, on appeal; L. R. 5 Ch. D. 153; 46 L. J. Ch. 516. Here the suppliants seem to be joint tenants as devisees in trust.

(*l*) Dicey's Parties to an Action, p. 11.

been seized by the Crown during the life of the testator suing by petition of right for restitution of it (*m*); and a legal personal representative for sums of money of which his ancestor had, as he alleged, been deprived by the Crown (*n*). The only case upon the question of assignment appears to be that of *Re Rolt* (*o*), in which the assignees of a bankrupt contractor with the Crown seem to have presented a petition of right without objection being made.

Upon the course to be adopted upon the death of one of two joint suppliants, see *Tobin* v. *Reg.* (*p*).

(*m*) *James* v. *The Queen*, *supra*, p. 40.

(*n*) *Frith* v. *The Queen*, L. R. 7 Ex. 365; 41 L. J. Ex. 171; 26 L. T. 774; 21 W. R. 19.

(*o*) *Re Rolt*, 4 D. & J. 44.

(*p*) 33 L. J. (N.S.) C. P. 199, at p. 200.

CHAPTER VI.

WHERE THE PETITION SHOULD BE SUED.

Claims arising out of English jurisdiction.

ASSUMING the suppliant to be in possession of a claim against the Crown of such a nature as to entitle him to present a petition of right, some difficulty may arise in determining where such petition should be presented and sued.

The difficulty will arise when the claimant's suit affects lands, things, or contracts, situate or made outside the jurisdiction of the English Courts.

If a proper tribunal in the place where the property, &c., is.

Of course if the claimant resides in some colony, place, or dependency, and his claim arises out of dealings between himself and the Crown therein, then if the tribunals of such colony, place, or dependency, are enabled by statute or otherwise to entertain such suits, no serious difficulty will probably arise, as the suppliant, seeing that his remedy is assured to him at home, would scarcely come to England to prosecute it; if, however, he does come, he will not receive assistance from the English Courts, whether his claim is for specific property, real or personal, or on a contract between himself and the Crown.

Reiner v. *Marquis of Salisbury.*

This is well illustrated by the decision in a recent case (*a*). There the plaintiff, a farmer in Bavaria, filed a bill in England against the Secretary of State for India, to compel him to allow discovery and inspection of certain documents of title in the archives of his office, relating to an estate of

(*a*) *Reiner* v. *Marquis of Salisbury*, L. R. 2 Ch. D. 378.

the plaintiff's in India, for the recovery of which he was about to commence a suit by petition of right against the Crown in England; and it thereby became necessary to consider whether such suit was maintainable in England, as if not he had no right to discovery. Vice-Chancellor Malins in giving judgment upon this portion of the case said: "Now what is the title of this plaintiff to sue? He has no right to sue in this country to recover land situate in India. His right is to sue in India, as I pointed out in the case of *Doss* v. *Secretary of State for India.* I there decided that if a person had a claim to property in India, the proper tribunal for the recovery of such property was in India, where there are Courts armed with every requisite power for granting relief. I then said that the subject matter in dispute being in India, the plaintiff resident in India, and the Secretary of State being in India as well as in this country, all circumstances concurred in shewing that if the case could be sustained at all, it was in the Indian Courts and not in the Courts of this country. That was a suit in which the plaintiff claimed a debt, and if I was right in that case in holding that the Indian Courts were the proper tribunals, how much stronger is this case where the claim is for land in India? It is not the practice to entertain suits in this country for the recovery of land in a foreign country; you cannot, in my opinion, maintain a suit in this country for the recovery of land in the colonies or a foreign country. At the same time that the Crown took possession of India the Government provided also for the establishment of tribunals to decide any questions of law or of equity which could arise. There the Courts are armed with legal and equitable jurisdiction with regard to discovery and every other doctrine inherent in the Courts of this country. The proper course would have been for the plaintiff to institute a suit in India, and he would have

had the same right to discovery there that he would here. To suppose for one moment that the Crown can be sued in this country to recover land in India, is a doctrine which is quite unsustainable."

The contract made,

The foregoing decision was given with regard to land, and it is apprehended that the same rule would hold good with regard to contracts (*b*). Lastly, where a suppliant sought to recover by petition of right presented to the Crown in England a debt alleged to have become due to the person whom he represented from the Sovereign of Oude, before that province was annexed in 1856 to the territories of the East India Company, it was held that, assuming the East India Company became liable to pay the debt by reason of the annexation of the province, the Secretary of State in Council for India and not the Crown was, by the provisions of the "Act for the better Government of India, 1858," the person against whom the suppliant must seek his remedy.

or the debt due.

Kelly, C.B., in giving judgment, said: "I am of opinion that the Crown is entitled to our judgment. Assuming that the allegations in the petition as to the original liability of the Sovereign of Oude are correct, and also that upon the annexation of that province in 1856 to the territories of the East India Company the liability passed to the Company, the objection taken by the Attorney-General, viz., that the suppliant has misconceived his remedy, and that if he had one it was against the Secretary of State in Council for India, appears to me to be fatal. For whatever the liabilities of the Company were, they were all transferred by the Act of 1858, not to her Majesty but the Secretary of State for India, and against him the suppliant's remedy, if he have a remedy, must be. The terms of the Act are clear."

(*b*) For the different colonial statutes by which claims arising out of contracts with the colonial governments can be enforced, see Appendix B.

Martin, Bramwell, and Channell, BB., concurred in this opinion (*c*).

No such enabling statute may, however, exist in the colony, place, or dependency in which the claimant is resident, and it may or may not be governed by the Common Law of England. What is his position in such a case? Where no tribunal,

In the latter case the doubt which was suggested in the last chapter, viz., whether he is entitled to present a petition of right at all, will first have to be decided in his favour, and in either case it would seem that his petition will have to be presented to the Crown in person, that is to say in England.

This question then arises: supposing that in his petition he prays for and obtains the usual fiat from the Crown that "right be done," and that the matter is thereby referred, as it would be under such circumstances, to the English Courts to determine, would they entertain his claim, or refuse to deal with it as a matter beyond their jurisdiction?

In the case of such a petition presented to recover land from the Crown situate in a colony it is very doubtful if they would entertain it, as appears from the following case (*d*).

A petition of right was presented in England, by which it was sought to recover lands at Bytoun in Canada, which by a Provincial Act of Parliament were vested in the Queen "for the benefit, use, and purposes" of the province, and subject to the provisions of a certain Provincial Act, and to any further provisions which the Legislature of Canada might from time to time enact in respect thereof. The petition being referred to the Court of Chancery, the Attorney-General demurred on behalf of the Crown on the ground and (1) the claim is for land.

(*c*) *Frith* v. *Reg.* L. R. 7 Ex. 365; 41 L. J. Ex. 171; 26 L. T. 774; 21 W. R. 19; and see *Doss* v. *Secretary of State in Council for India*, L. R. 19 Eq. 509.

(*d*) *Re Holmes*, 2 J. & H. 527; 31 L. J. Ch. 58; 8 Jur. N. S. 76; 5 L. T. 548; 10 W. R. 39.

that there was no jurisdiction in the English Court of Chancery to entertain the matter.

Re Holmes. The Court allowed the demurrer. For the petitioner it was argued that, admitting that a Court in England could not make a decree "in rem" as to land in Canada, still this proceeding was "in personam" to obtain a direction from the Court to the Sovereign to convey the land in question to the suppliant, and that as the Sovereign against whom alone the proceeding was directed was present within the English jurisdiction, the suppliant was entitled to succeed, although the subject matter of the action might be in Canada.

Vice-Chancellor Sir William Page Wood, in giving judgment, said, "It is asked that this Court direct a conveyance to be made in accordance with the provisions of the statute (viz., the colonial statute under which the claim was founded). In order that this may be so it is requisite that the trustee should be present in this country, and subject to the operation of such decree as the Court may make. Now, it is said that the Queen is present here, and therefore amenable (by virtue of the recent Act, i.e., the Petition of Right Act) to the jurisdiction of this Court. But it would be at least as correct to say, that as the holder of Canadian land for the public purposes of Canada, the Queen should be considered as present in Canada and out of the jurisdiction of this Court. This alone supplies a sufficient answer to the argument of the suppliants, and without entering into a number of other questions which this case involves, it is enough to say that when land in Canada is vested in the Queen, not by prerogative, but under an Act of the Provincial Legislature for the purposes of the province, and subject to any future directions which may be given by the Provincial Legislature, I hold that for the purposes of any claims to such land, made under the provincial statutes, the Queen is not to be regarded as within the jurisdiction of this Court.

I wish to rest my decision upon the broadest ground, that it was not the object of the Petition of Right Act, 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony, and upon that ground I allow the demurrer: (dismissing other questions) I prefer to rest upon the higher ground, that this land cannot be withdrawn from the control of the Canadian Legislature and brought within the jurisdiction of this Court merely on the technical argument that the Queen in whom it is vested, for Canadian purposes, is present in this country."

The circumstances of the above case were, no doubt, exceptional, and such as would make an English Court reluctant to interfere; and possibly, therefore, the foregoing decision might be considered inapplicable to a case in which the Crown was in possession, free from any trust or condition. It may be worth while then to consider whether in the latter case any relief could be obtained. The question discussed.

A suppliant seeking such relief would have to ask the Court to act either "in personam," that is, to direct the Sovereign to put him in possession, or "in rem"—that is, to put him in possession by its officers, and in either case he would have difficulties to encounter.

Before asking the Court to act "in personam" he would have to satisfy himself that a petition of right lies for such a decree, for which it would be very difficult, if not impossible, to obtain a precedent, and also that the Court can issue mandatory orders of such a nature to the Crown. Before asking them to act "in rem," that the fact of the proceedings being by petition of right is sufficient to make the Court depart from its established practice of not giving judgments "in rem" with regard to property outside the jurisdiction of their Courts (*e*).

(*e*) *Penn* v. *Lord Baltimore*, 1 W. & T. L. C. 1047 (Edit. 1886).

Whether the fact that the Crown was quasi defendant would in itself be sufficient it is difficult to say. But suits between subjects and suits between the Crown and a subject certainly differ in many points, and it may be that the reasons which in the former case are sufficient to deter the Court from interfering might not be so in the latter.

For instance, the refusal of the Court to give a judgment "in rem" with regard to land out of the jurisdiction in suits between subjects seems chiefly based on the consideration that a judgment, if obtained, could not be enforced, since a writ of possession, which is the only means of enforcing it, is not current outside the limits of the country in which the Court is situate (*f*). But where the Crown is respondent to a petition of right for lands and the suppliant succeeds, no such writ is required to put him in possession; but he is entitled to a judgment of *ouster le main* (*g*), the effect of which judgment is instantly to put the Crown out of possession, and "thereupon the party for whom judgment is given may enter forthwith into the lands and shall be said no intruder. And the reason of it is because the judgment tyeth not the king to the delivery of the possession, but only to leave his hands of the possession" (*h*). It is true that if any official or patentee of the Crown is in possession, the suppliant, it seems, is entitled in addition to a writ of *amoveas manus* against such official or patentee to put him out of possession; but the Crown is out of possession as soon as judgment is given, "not forcinge whether anye of these writtes be awarded or not" (*i*).

(2) Where the claim is in contract.

Such is the suppliant's position where his claim is for land out of the jurisdiction of the English Courts, and having no remedy in the country where the land is situated, he has

(*f*) Broom's Maxims, p. 94 (ed. 1884).
(*g*) Staunford's Prerog. cap. xxiv., fol. 77 b.
(*h*) Ibid. 78 a. (*i*) Ibid.

to sue his petition in England, and his position is the same where he is proceeding under similar circumstances for chattels. If his claim is on a contract he will in addition have to shew that the contract is one of which the English people, and not the colony, have obtained the benefit, and that he is not saddling the English revenue with a liability incurred in respect of one of its dependencies (*k*).

But though the Crown may object to the jurisdiction it may waive such objection, and proceed to a hearing on the merits. This appears from a case which came before the Exchequer Chamber upon error from the Queen's Bench upon a judgment upon demurrer in a petition of right (*l*). There the petitioner, who was described as an Irish spirit grocer, sought to recover back from the Crown by petition of right presented in England an excess of duty which had been charged him for a spirit license by an officer of Excise in Ireland, and which had been paid by him under protest. The petition was signed by the suppliant in person, and an address in London was appended. In the course of the argument Earle, C.J., inquired whether the case could not have been raised in Ireland, upon which the Attorney-General replied that the Crown had thought it better not to object to the petition, but to meet the case upon the merits, and the Court thereupon gave judgment without considering whether the suppliant's claim could be the subject of a petition of right in England.

And a similar objection was raised, but not decided, in a subsequent case upon a contract made in a colony (*m*).

(*k*) *Frith* v. *Reg.*, L. R. 7 Ex. 365; 41 L. J. Ex. 171; 26 L. T. 774; 21 W. R. 19.

(*l*) *Reg.* v. *Dickson*, 11 W. R. 919 (1863, May 11, at which date the Irish Petition of Right Act had not been passed).

(*m*) *Ryland* v. *The Queen*, *Times* Newspaper, 1883, Dec. 8; and see *Burke* v. *Reg.*, *infra*, p. 93.

CHAPTER VII.

FOR WHAT A PETITION OF RIGHT WILL NOT LIE.

THE object of this chapter is to draw attention to a certain class of cases in which it has been held that a petition of right will not lie.

The injury must be a "legal injury."

In the first place a petition of right cannot be maintained for any act of the Crown or its agents which does not amount to a legal injury to the person to whom the act is done; for any act, that is to say, for which, if done by one subject to another, no action could have been maintained.

Obvious and reasonable as this doctrine seems, the opposite view used not long since to be maintained. It seems to have been thought that it was sufficient if the suppliant's claim against the Crown was founded on "justice," if, that is to say, he could shew that he had what is popularly called a moral claim upon the gratitude or benevolence of the Crown, or that he laboured under some hardship which the existing laws were inadequate to remove.

Mr. Anstey's theory

This latter view, which subsequent decisions have shewn to be erroneous, found a very strenuous advocate in Mr. Anstey, who, in his "Letter to Lord Cottenham as to the Law and Practice upon Petition of Right" (*a*), defines a petition of right to be "a suit of the subject to the Sovereign in every case where there is a failure of the necessary jurisdiction in all inferior Courts for doing him justice;" and the criterion which he proposes to establish for enabling

(*a*) London, 1845.

any one to judge whether in any particular case a petition of right will lie is "the justice of the case stated by the suppliant." But how this is to be decided without any reference to the law of the land it is difficult to see.

a mistaken one.

The origin of this misconception of the nature of a petition of right is not very difficult to trace. Any one who looks, as the author of the foregoing letter had looked, at the Rolls of Parliament in which the earliest applications to the Crown by petitions are to be found, cannot fail to be struck with the fact that in a large number of cases applications are made to the benevolence of the Crown where the suppliant has no legal claim upon the Sovereign; that cases such as Cadell's (*b*), in which the suppliant prays for a reward because he has lost his brother and cousin in the wars in Ireland, are by no means infrequent.

The fallacy lies in supposing that all the applications recorded in the Rolls of Parliament must be petitions of right; in not recognising that therein are recorded all petitions, be they of grace or right, as we should now call them; that at the time when those records were compiled, petition of right, as we now understand it, did not in all probability exist at all; and that a spontaneous act of generosity done by a king upwards of 600 years ago cannot be made the measure of what can be legally extracted from his successors.

It is needless, however, to follow this line of argument further, for whatever may have once been the authority of such a proposition, it is now too well settled that no relief can be expected from the Crown in such cases. Such a theory is, perhaps, best answered in the words of the late Justice Maule, who, when the late Sergeant Manning suggested in the Baron de Bode's Case that the proceeding by petition of right did not render it necessary for the

(*b*) Ryley's 'Placita Parliamentaria,' p. 414.

suppliant to shew a legal right, and that it was sufficient for him to shew that his claim was founded on justice, replied (*c*) "that neither the Queen's Bench or any other Court of law administered justice in general, and that if the suppliant's claim was not cognisable by the Queen's Bench as a claim in law it might be that the Court had no power to give any judgment at all."

The true theory given in *Feather* v. *The Queen*.

A further answer may be found in the words of the Court of Queen's Bench in the case of *Feather* v. *The Queen* (*d*). "It must be borne in mind," they said, "that a petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on a violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition, therefore, must shew upon the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of judicial procedure."

The subject cannot sue by petition for all legal injuries.

It must not be inferred, however, from the foregoing words that every violation of right or legal injury for which an action would lie by one subject against another can, if committed by the Crown or its agents against a subject, be the foundation of a petition of right; and that the rights and remedies which a subject has against the Crown by petition are co-extensive with those which he has against his fellow-subjects by action. Such an inference would, as we shall see hereafter, be entirely erroneous. In the first place it would be wrong to make the rights and remedies which exist between subjects the measure of those which exist between subjects and the Crown, since historically they are unconnected and have been developed on entirely

(*c*) 13 Q. B. at p. 387, note.
(*d*) 6 B. & S. 294; 35 L. J. Q. B. 200; 12 L. T. 114.

different principles; and in the second place there are some acts which are legal injuries when done by a subject, but are not so when done by the Crown. One subject, for instance, can sue another for an assault, but he has no remedy in such a case by petition of right against the Crown.

Still, it may help us to understand the position of the subject towards the Crown if we take the legal injuries which fellow-subjects are capable of inflicting upon one another, and at once eliminate therefrom such as are inapplicable where the Crown is the defendant; and this is the method which we propose now to adopt.

Division of legal injuries.

All the legal injuries which one subject can inflict upon another are contained in two classes, they are either breaches of contract or torts. We do not propose to give here any definition of a tort or a list of the legal injuries which have been determined to be such, these the reader will find in the text-books upon the subject. The purpose for which this division of injuries has been given is to enable us to point out that no petition of right can be maintained against the Crown for any act of its own or its agents done to a subject which, had the same been done by one subject to another, would have been a tort for which an action could have been maintained, or to put the same thing in shorter but less accurate language—less accurate because, as we shall see, the Crown is incapable of committing a tort personally or by its agents—no petition can be maintained against the Crown for a tort.

The subject cannot sue by petition for a tort.

The grounds of this doctrine are as follows:—It is a maxim of the English law that the king can do no wrong, and this principle applies not only to his own personal acts, but also to those which are done by his servants or agents by his express or implied command. The consequence of this is, that as the king can do no tort the suppliant can never maintain a petition of right against the Crown, where he

The reason why.

grounds his title to relief upon the invasion of some right which he possesses by a wrongful act of the Crown or its servants which amounts to a tort.

There is ample authority for this proposition, although no instance can be found in the books of any such claim until quite recently.

Authorities: *Canterbury* v. *Reg.*

The first occasion upon which this question seems to have arisen was in the case of *Viscount Canterbury* v. *The Queen* (1843) (*e*).

The circumstances which gave rise to this question were as follows:—

Viscount Canterbury was speaker of the House of Commons, and as such had rooms in the old palace of Westminster assigned to him as a dwelling-house by the king. In another room in the palace the old Exchequer tallies were kept, and these had become so numerous that an order was given to certain persons to burn them. This order was given by the Commissioners of Woods and Forests, and was so negligently carried out that the suppliant's house, containing £10,000 worth of pictures, plate, and furniture, was burnt down in the process. This sum the petitioner sought to recover from the Crown.

To this petition the Attorney-General demurred, and upon the argument the question was raised whether, assuming the persons whose negligence caused the fire were the servants of the Crown, the Sovereign could be made liable.

Lord Lyndhurst, the Chancellor, in giving judgment, said: "There is a difficulty in the way of the petitioner which struck me at the very commencement of the argument, and to which I have not heard a sufficient answer. It is admitted that for the personal negligence of the Sovereign neither this nor any other proceeding can be maintained. On what ground then can it be supported for

(*e*) 12 L. J. Ch. 281; 1 Phillips, 306; 7 Jur. 224.

the acts of the agent or servant? If the master or employer is answerable on the principle 'qui facit per alium facit per se,' this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign in whom negligence or misconduct cannot be imputed; and for which if they occur in fact the law affords no remedy. Cases have arisen of damage done by the negligent management of ships of war. It has been held that where an act is done by one of the crew without the participation of the commander the latter is not responsible. But if the principle which is now contended for be correct, the negligence of a seaman in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right. Though several cases of this nature have happened at different periods, it seems never to have occurred to the persons injured or their advisers that redress could be obtained by means of petition of right. It would require, I think, some very precise and distinct authority to establish such a liability, and in the absence of any such authority I cannot venture for the first time to lay down a rule which it is obvious would lead to such extensive consequences."

The next occasion upon which this question seems to have come under the notice of the Courts was in the year 1864, when the case of *Tobin* v. *The Queen* (*f*) was heard. *Tobin* v. *Reg.*

In that case a ship belonging to the suppliants was wrongfully seized and destroyed by an officer commanding one of her Majesty's ships assuming to act under the autho-

(*f*) 33 L. J. C. P. 199; 16 C. B. (N.S.) 310; 10 Jur. (N.S.) 1029; 10 L. T. 762; 12 W. R. 838.

rity of her Majesty for the suppression of the slave trade, and the suppliants sought to recover damages for this wrongful act.

The Court of Common Pleas, consisting of Erle, C.J., and Williams, Willes and Keating, JJ., were all of opinion that the petition did not shew a complaint in respect of which a petition of right could be maintained against the Crown upon three grounds, the last of which was that a petition of right could not be maintained to recover unliquidated damages for a trespass.

Upon this point they said: "The complaint is of a wrong done in destroying a ship, and the claim is for damages the same as might have been awarded if, instead of a petition of right, an action of trespass had been brought against the trespassers. For the purpose of shewing that a petition of right cannot be maintained for this complaint, we purpose to refer first to the principle that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty, and then to the authorities which shew where a petition of right will lie.

"The maxim that 'the king can do no wrong' is true, in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; that which the Sovereign does personally the law presumes will not be wrong; that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command be unlawful it is in law no command, and the servant is responsible for the unlawful act in the same way as if there had been no command. Lord Hale says: 'The law presumes the king will do no wrong, neither indeed can do any wrong; and, therefore, if the king command an unlawful act to be done the offence of the instrument is not thereby indemnified. But though the king is not under the coercive power of the

law, in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.' Lord Coke also says to the same effect, in commenting on præceptum Regis in the statute Westminster, 2 (2 Inst. 186): 'The king being a body politic cannot command but by matter of record, for Rex præcipit and Lex præcipit are all one, for the king must command by matter of record according to law;' and he adds, 'Markham said to King Edward IV., that the king could not arrest any man for suspicion of felony as any of his subjects might, because if the king did wrong the party could not have his action. If the king command me to arrest and I do arrest, he shall have his action of false imprisonment against me, albeit he was in the king's presence;' and he adds that Bracton says, 'Nihil aliud Rex potest quam quod de jure potest.' To the same effect is 3 Black. Comm. 246: 'The king can do no wrong, which ancient and fundamental maxim is not to be understood as if everything transacted by the Government was, of course, just and lawful, but means only two things: first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people—for this doctrine would destroy the constitutional independence of the Crown; and secondly, that the prerogative of the Crown extends not to do any injury.' This maxim has been constantly recognized, the notion of making the king responsible in damages leading to consequences that are clearly inconsistent with the duty of the Sovereign."

The Court then proceeded to review the authorities, and came to the conclusion that no precedent had been produced in which a claim for unliquidated damages founded upon a wrong had been maintained against the Crown.

Feather v. Reg.

In the following year was decided the case of *Feather* v. *The Queen* (*g*).

There the suppliant brought a petition of right claiming damages for an alleged infringement by the Lords of the Admiralty of a patent granted to him by the Crown.

To this the Crown demurred, and the demurrer was upheld upon two grounds.

First, because an ordinary grant of letters patent did not prevent the Crown from using the invention; and secondly, and this is the point most material to the present purpose, supposing the law were otherwise the patentee would have no remedy by petition against the Crown, as the act would amount to a wrong.

In giving judgment the Court of Queen's Bench, consisting of Cockburn, C.J., Crompton, Blackburn, and Mellor, JJ., said as follows:—

"No case has been adduced in which a petition of right has been brought in respect of a wrong properly so called by the Crown. And not only is there no such precedent, but if the matter is considered as to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in such a case against the Crown. The maxim that 'the king can do no wrong' applies to personal as well as political wrongs, and not only to wrongs done personally by the Sovereign (if such a thing could be supposed possible), but to injuries done by one subject to another by authority of the Sovereign. For from the maxim that the king can do no wrong it follows, as a necessary consequence, that the king cannot allow wrong to be done; for to authorize a wrong to be done is to do a wrong; and as the wrongful act done becomes in law the act of those who authorize it to be done, it follows that the petition of right which complains of a tortious or wrongful act by the Crown

(*g*) 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114.

or by servants of the Crown discloses no right to redress, for as in law no such wrong can be done no such right can arise, and the petition which rests on such a foundation falls at once to the ground. As the infringement of the patent right constitutes a tort or wrong in the proper sense of the term, and no wrongful act can be alleged against the Crown, our opinion is that even if our decision upon the first point were in favour of the suppliant, a petition of right to the Crown is not open to him as a means of redress."

The above rule obtains in Canada: *Queen* v. *McFarlane.*

The principle here established has recently been followed by the Canadian Courts. The first occasion was in the case of the *Queen* v. *McFarlane* (1882) (*h*). There the suppliants sought to recover damages for losses sustained by them through the breaking of a boom in the Ottawa river, situate below certain timber slides, the property of her Majesty, at or near to Arnprior, by means of which several logs of the suppliants' were wholly lost, and the suppliants put to trouble and expense in recovering others—all, as alleged, through the improper and negligent conduct of John Harvey, a servant of her Majesty, who then was and for some years before had been slide master at that place, duly appointed by the Government under the provisions of 31 Vict. c. 12, s. 28 (Canadian).

To this petition the Attorney-General demurred on behalf of her Majesty, on the ground that the Crown was neither liable for its own or its servants' negligence.

In giving judgment, the Court (Ritchie, C.J., Strong, Gwynne, Henry, Taschereau, JJ.) were all of opinion that a petition founded upon a wrong could not be sustained, and with one exception decided for the Crown upon that ground. Henry, J., however, saw evidence of a contract between the petitioner and the Crown of which there had been a breach by the latter, and on that ground decided for the petitioner.

(*h*) 7 Supreme Court of Canada Reports, 216.

Ritchie, C.J., said:—"The claim set forth in the petition is a tort pure and simple, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the word shews no title to legal redress against the Sovereign. In contemplation of law the Sovereign can do no wrong, and is not liable for the consequences of her own personal negligence, so she cannot be made answerable for the tortious acts of her servants. The doctrine of 'respondent superior' has no application to the Crown, it being a rule of the Common Law that the Crown cannot be prejudiced by the wrongful act of any of its officers, for as it has been said long ago, no laches can be imputed to the Sovereign, nor is there any reason that the king should suffer by the negligence of his officers or by their compacts or combinations with the opposite party."

Queen v. *McLeod.*

This was followed by the case of the *Queen* v. *McLeod* (*i*). There the suppliant brought his petition to recover damages for personal injuries sustained by him as a passenger upon a railway in Canada, the property of her Majesty, but under the control and management of the Minister of Railways and Canals of Canada under a Canadian statute, in consequence of the gross negligence of the management.

It was proved that the suppliant took a ticket and sustained the injuries complained of by reason of gross negligence in the management, but he was not held to be entitled to recover, upon the principle that the Crown is not liable for the torts of itself or its servants.

The contention that was raised on behalf of the suppliant, that the taking of a ticket constituted a contract between the suppliant and the Crown, for the breach of which he was entitled to recover, was also negatived by the majority of the Court, who considered it as rather in the nature of a toll, the acceptance of which by the Crown did not impose

(*i*) 8 Supreme Court of Canada Reports, 216.

any contractual relations between the payer and the recipients.

It may not be uninteresting to notice here that when the United States recognised, in 1855, the principle of the liability of the State to be sued by subjects, and constituted the Court of Claims for the hearing and determining of such actions, the jurisdiction of this Court was by the statute which created it (10 U. S. Statutes at Large, 612, ch. 122) expressly limited "to claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States," and that these words have been judicially held "to exclude by the strongest implication demands against the Government founded on torts" (per curiam *Gibbons* v. *United States*, 8 Wallace 269, at page 275), and that for reasons very similar to those adduced above in support of the maxim that "the king can do no wrong." The most recent case in which this principle has been affirmed seems to be *Langford* v. *United States* (*k*).

And also in America.

Gibbons v. *U. S.*

Langford v. *U. S.*

There under a claim that they belonged to the Government, an officer seized for the use of the Government buildings owned by a private citizen, and the owner sought to recover against the State for use and occupation.

He argued that as the State could do no wrong, the entry and occupation by the officer could not be regarded as a trespass, but as under an implied contract to pay.

The Court held that the act complained of was an "unequivocal tort," and that the State were consequently not liable.

They said, "The jurisdiction of the Court of Claims has received frequent additions, but the principle originally adopted of limiting its general jurisdiction to cases of contract remains. There can be no reasonable doubt that this

(*k*) 11 Otto 341: cited also as 101 U. S. Rep. 341.

limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the Common Law. The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States, when made by some officer of the Goverment acting under that authority, with power vested in him to make such contracts or to do acts which implied them, the very essence of a tort is, that it is an unlawful act done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that Court. This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the Court, and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all wrongs committed by its officers or agents under a mistaken zeal or actuated by less worthy motives."

The conclusions, then, at which we arrive are as follows: first, that the injury upon which the suppliant bases his claim must be a legal one, and secondly, that it must not be in the nature of a tort.

It must not, however, be supposed that because in the foregoing chapter we have shewn the remedy by petition of right to be inapplicable to only one class of legal injuries, viz., torts, that it is therefore applicable to all the remaining

ones, as such a conclusion would be entirely erroneous. It cannot be too constantly borne in mind that the rights which the subject has against the Crown are entirely different to and independent of those which he has against his fellow-subjects; and further, that the test by which it can be decided whether any particular claim of a subject's against the Crown can be maintained is not its legal sufficiency considered as a claim against a subject, but the foundation in precedent which it has considered as a claim against the Crown.

The true test of whether a petition lies.

In the next chapter will be found enumerated the different instances so founded upon precedent in which the suppliant has been held to be entitled to proceed by petition of right.

CHAPTER VIII.

AN ENUMERATION OF THE CASES IN WHICH PETITION OF RIGHT LIES—THE AUTHORITIES UPON THE SUBJECT CONSIDERED.

What authorities cited.

IN this chapter will be briefly stated the various cases in which a petition of right can be maintained against the Crown under the Petitions of Right Act, 1860, and those for the restitution of property will be specially considered, for which purpose all the cases which have been decided both before and after the passing of the Act will be brought under review (*a*).

The expression "all the cases" possibly requires some limitation.

Parliamentary petitions omitted.

Petitions of right are to be found, as we have seen, on the Rolls of Parliament for the reign of Edward II. (*b*), and as many instances might have been taken from the Rolls of that and successive reigns to illustrate the present branch of the subject, the omission of them needs some explanation.

This omission may be justified on the following grounds: in the first place, however valuable such extracts might have been to prove the bare existence of "petitions of right" at that period, they would have been quite useless as authori-

(*a*) As the Petitions of Right Act, 1860, did not alter the law, but only the practice, every decision before the Act is still an authority; *Tobin* v. *Reg.* 33 L. J. (C.P.) 205; 16 C. B. (N.S.) 310; 10 L. T. 762; 12 W. R. 838; 10 Jur. (N.S.) 1029.

(*b*) See cases collected, *ante*, p. 11, note 2.

ties to shew what could be recovered upon them; because no record of the proceedings subsequent to the answer to the petition having been preserved upon the Rolls, there is no record of the judgment delivered. All that is to be found is the petition and answer; whether thereupon the king or the subject recovered there is no means of knowing. In the second place, although by the light of subsequent knowledge it is possible to be satisfied that the petitions recorded in the Rolls of Parliament are the ancient counterparts of the modern petition of right, yet it is not so easy to get rid of the impression that a petition of right then and now are two slightly different things, the former being as it were but the germ of the latter, and that therefore any argument from the one to the other may be fallacious.

The reason for this omission.

For these reasons it has been thought best throughout this work not to carry the search for precedents higher than the decisions by courts of law upon petitions of right to be found originally in the Year Books and then digested in the old Abridgments, such as Fitzherbert's and Broke's.

The cases are usually cited in the words of the Digest, but it must not be supposed from this that the original reports have not been consulted; on the contrary, the two have been carefully compared, and it has generally been found that no very useful addition could be made to the note of the case given in the Digest.

Lastly, a word must be said as to the continuity in the line of cases upon petition of right from the earliest to the present time. No one who reads the following pages can help being struck by the fact that there is a very considerable gap in the series of decisions, and that, roughly speaking, there appear to be no cases upon petition of right from about the year 1550 to the year 1800.

Discontinuity in the line of authorities.

The reason why this should be so is not very easy to find, but the following explanation may be suggested. In the

first place it should be remembered that the largest proportion of the lands and property which came to the hands of the Crown came through the working of the feudal system and the fines, forfeitures, and escheats occasioned thereby; and that originally petition of right was the only means by which this could be recovered. This accounts for the large amount of business at first transacted thereon, while the decline in it arose from the following causes. In the reign of Edward the 3rd, to avoid the delay and cost attendant upon petition, two other remedies were introduced for the same purpose, viz., "traverse of office" and "monstrans de droit," into which channels a great deal of the business which had formerly been done upon petition was diverted. Comparatively little then remained, and this was put an end to by the abolition of the feudal tenures in the reign of Charles II.

This being so, it is at first difficult to see why petition of right should have ever been revived. The revival seems to have come about as follows. It was not due to any new necessity for a method of recovering land, but rather for some means by which contracts entered into by Crown agents for the supply of the public service could be enforced, in proof of which the fact that all the earliest cases upon the revival were to enforce contracts and not to recover land may be adduced.

Whether this new use of petition of right was and is justifiable is a matter which will hereafter be considered; meanwhile an attempt will be made to classify the cases themselves.

Classification of authorities.

These cases then may be divided into four classes, namely: (1) claims for the restitution of property wrongfully taken and detained by the Crown; (2) claims arising out of some contract made between the Crown and a subject; (3) those in which certain equitable claims have been sought to be

enforced against the Crown; and (4) lastly, those in which certain claims made enforceable by this means by statute were prosecuted.

Each of these classes will be the subject of special consideration, but before proceeding therewith it is necessary to make a general statement with regard to all of them. This is that these cases have been classified so as to include every instance in which a subject has up to the present time rightly or wrongly succeeded upon a petition of right—every decision, that is to say, which has been given in the suppliant's favour has been included. Some of these decisions are possibly open to question, but it has been thought better to include them for what they are worth, than give a narrower classification by which they might have to be omitted. Care, however, will be taken to point out in what particulars those judgments seem open to observation.

Petitions of right for the restitution of property will be now specially considered.

CHAPTER IX.

Of Petition of Right to obtain Restitution of Specific Property.

Of petitions for restitution of property generally,

In the following chapter will be considered the cases in which a subject can proceed by petition of right against the Crown for the restitution of property, and the authorities by which a proceeding may be supported.

These cases have been put first because they can shew the longest and best title. Long before the subject sought to enforce equitable, statutory or contractual claims against the Crown, his right to the restitution of property by this means was established, this right having been at first confined to the recovery of realty and afterwards extended to chattels. Petitions for this purpose can be traced from the Rolls of Parliament of the reign of Edward II. to the present day, and there is very good reason for believing that they were until quite recently the only ones known to the law. Thus neither Fitzherbert's nor Broke's Abridgment (*a*) contain, under the title Petition, a single case which is not for the restitution of property, and the definition of petition given by Staunford is equally conclusive.

and the authorities by which they can be supported

The authorities amongst text writers by which the statement that land and goods may be recovered by this means from the Crown are as follows.

(*a*) Broke's Abridgment gives in all forty-four cases under the title "Petition," but none are for anything but the restitution of property.

Staunford (*b*), writing in the year 1573, says: "Peticion is all the remedy the subject hath when the king seizeth his lands or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition only, for other remedy hath he none." Blackstone (*c*), Comyn (*d*), and Chitty (*e*), concur in this statement of the law. text-writers'

Further authority for the same proposition is to be found in two passages from considered judgments of the Court of Common Pleas and Queen's Bench respectively, both summarizing the objects for which a petition of right will lie. The first is as follows: "The substance of the proceeding upon petition of right seems always to have been the trial of the right of the Crown to property or an interest in property which had been seized by the Crown, and if the subject succeeded the judgment only enabled him to recover possession of that specified property or the value thereof, if it had been converted to the king's use" (*f*). The second is somewhat more extensive: "We (*i.e.*, the Court of Queen's Bench) concur with the Court of Common Pleas in decisions, *Tobin* v. *Reg.* *Feather* v. *Reg.*

(*b*) Prerog. chap. xxii., Peticion, p. 73 a. It should be noticed that this passage contains a very characteristic statement of what the writer of it considered to be the true position of petition of right, viz., the ultimate right which the subject had against the Crown supposing the seizure, not being by the order of the law (*i.e.*, by office), did not justify a traverse or a monstrans. He does not discuss the question whether, supposing a traverse or a monstrans are available, a petition is also available, but assumes that where appropriate the former remedies will be always preferred to the latter; and that it is only where they fail that the subject is "driven" to his petition.

(*c*) Commentaries, book iii., p. 255 (ed. 1768).

(*d*) Dig. tit. Prærog. D. 78. (*e*) Prærog. p. 341.

(*f*) *Tobin* v. *The Queen*, 16 C. B. (N.S.) 310, at p. 357 (*per* Erle, C.J., Williams, Willes, and Keating, JJ.), 33 L. J. (N.S.) C. P. 199, at p. 207; 10 L. T. 761, at p. 765; 12 W. R. 838, at p. 842; 10 Jur. (N.S.) 1029, at p. 1033.

thinking that the only cases in which the petition of right is open to the subject are where the land, or goods, or money of a subject have found their way into the possession of the Crown, and that the purpose of the petition is to obtain restitution (*g*)." Following upon this general statement of the law it is proposed to divide the further consideration of the subject into two branches, first giving an enumeration of the different species of property which may be recovered, and secondly some account of the kind of taking and debarring by the Crown which will justify the subject in proceeding by this means.

The various kinds of property which can be recovered considered:

Property is usually divided and subdivided as follows: First, real property, consisting of corporeal and incorporeal hereditaments. Secondly, personal property, consisting of chattel interests in land, pure chattels, and moneys. And now having given these general authorities with regard to every species of property, we propose to consider each of these divisions in turn, and first of real property.

Real Property.

Realty (1) corporeal.

Corporeal Hereditaments.—It has been long settled that this species of property can be recovered from the Crown (*h*), and even after the introduction of the statutory remedies by traverse and monstrans, of which we have spoken, it was still considered that petition of right was the true and only way of recovering freeholds (*i*). The reported cases, however,

(*g*) *Feather* v. *The Queen*, 6 B. & S. 257, at p. 298 (*per* Cockburn, C.J., Crompton, Blackburn, and Mellor, JJ.), 35 L. J. (Q.B.) 200, at p. 208; 12 L. T. 114, at p. 117.

(*h*) Nota fuit touche que travers de chose real ne fuit al comon ley, mes peticion ou monstrans de droit et contra de chattell; Y. B. 13 Ed. 4, 8; Bro. Abr., tit. Peticion, 30.

(*i*) Nota per Babbington Justice in l'exchequer chamber si office soit trouve que intytle le roy al fee simple ou frank tenement le partie greeve naver travers mes peticion, quod nemo negavit; Bro. Abr., tit. Peticion, 32; Y. B. 8 Hen. 5; Staunford's Prerog. cap. xx., fol. 61 a.

in which this particular species of freehold property has been recovered are not so numerous as might have been expected, for the reasons mentioned in the last chapter.

The reported cases are as follows:—

A disseisor died seised, and in default of issue the land thereupon descended to the Crown; the Crown entered, and the person who had been disseised brought petition of right against the Crown for the recovery thereof. Held, that he was entitled to succeed (*k*).

Again, I. S. was attainted for treason by Act of Parliament, and thereby condemned to forfeit to the Crown all the lands of which he was seised; an office found that he was seised at the time of forfeiture of certain lands, which indeed were not his, but A.'s. Held, that A. could recover from the Crown by petition (*l*).

The king being entitled in virtue of a collusive recovery, a stranger that hath good title may sue by petition for the recovery of his lands (*m*).

Side by side with these cases may be considered the rules which Staunford gives (*n*): "Also it is a general rule that where a stranger that hath title cannot enter upon a common person, but is driven to his action, there he can have no remedy against the king but only by petition, as take the case to be. It is found by office the king's tenant in chief died seised, his heir within age where in deed the said tenant had nothing, but by disseisin done to me, and I suffered him to die seised, without any claim made; in this case I am

(*k*) Y. B. 9 Ed. 4, 51; Bro. Abr., tit. Pet. 15. "Il fuit trouve per office que le duke de E. morust seysys del manour de E. C. que discende al roy et il entre et puis A sua al roy per petition, eo que il fut seisie del manor tanque per le dit Duke disseisie et proces continue tanque il avera restitution;" Y. B. 24 Ed. 3, 65; Bro. Abr., tit. Pet. 13.

(*l*) Y. B. 33 Hen. 8; Bro. Abr., tit. Pet. 35; Y. B. 3 Ed. 4, 24; Bro. Abr. tit. Pet. 27.

(*m*) Staunford's Prerog. cap. xxii., fol. 74 a.

(*n*) Prerog. cap. xxii., fol. 74 a.

driven to my petition. And so in all cases like where mine entry would be tolled if the lands were in the hands of a common person. Also whereas the king doth enter upon me, having no title by matter of record or otherwise, and puts me out and detains the possession from me, then I cannot have it again by entry without suit ; I have then no remedy but only by petition."

The only two modern cases upon this point are: *Palk* v. *The Queen* (*o*) and *Chevrier* v. *The Queen* (*p*), the former being an English, the latter a Canadian case. Both were unfortunately decided against the suppliant upon demurrer by the Crown—the latter upon grounds inapplicable to an English petition of right, while the proceedings upon the former have never been reported.

Formerly the rule was that only lands in the same county could be sued for in one petition, as appears from the following note:—

"Nota per touts les Justices d'ambideux Benches et lour opinion fuit q home ne poiet av petition de droit des terres in several counties mes solement des terres in un Count quia ceo est come un action real et ceo accidit in le petition de Arthur Baneth in l'Excheque Chamber dont vide Dier foll. 133 notab'e" (*q*).

Whether such a rule would hold good now it is impossible to say.

The absence of modern authority under this head might induce a suspicion as to the extent to which the general statements opening this chapter might be supported, were there not abundant authority with regard to the remaining species of property which will be now considered.

(*o*) See Appendix A, p. 5, *ad fin.*
(*p*) Canada, 4 Supreme Court Reports, 1 (1881).
(*q*) *Benloe & Dalison*, p. 46, case 84.

Incorporeal Hereditaments.

A *rent-charge* has been held to be recoverable from the Crown by this means. (2) Incorporeal rent-charges.

Thus it was held that where a man had title to a rent-charge issuing out of lands seized into the king's hand, in such a case, so long as the king's possession lasted, he might sue by petition and recover the rent (*r*), of which doctrine we have illustrations in the suit by petition of the Count of Kent for a rent-charge granted to his father by King Edward II. (*s*), and in certain dicta of the judges to a like effect in two cases decided in the reign of Edward IV. (*t*).

In drawing the petition for the recovery of a rent-charge the following direction should be observed: "And if the party sueth to the Crown by petition for the said rent, he ought to shew in his petition that he hath demanded the rent, for if the possession had been in a common person he could not distrain before demand, nor by consequence have assize. And the rent, notwithstanding the possession of the Queen, is demandable and payable for to entitle the party unto petition against the Queen, and to distress against the subject when the possession of the Queen is removed" (*u*).

(2.) There is also a case in which a *corody*, which is an allowance in money or food payable by religious houses to the king their founder for the sustenance of his servants, was successfully discharged after suit by petition of right to the Crown (*x*). Corodies.

(3.) At a very early date it seems also to have been de- Advowsons.

(*r*) Y. B. 9 Hen. 4, 4; Bro. Abr., tit. Pet. 9.

(*s*) Y. B. 21 Ed. 3, 47; Bro. Abr., tit. Pet. 11.

(*t*) Y. B. 13 Ed. 4, 6; Bro. Abr., tit. Pet. 29; Y. B. 4 Ed. 4, 21; Bro. Abr., tit. Pet. 28.

(*u*) See *Wicks and Dennis Case*, Leonard, part i., 190, case 271.

(*x*) Y. B. 5 Ed. 4, 118; Bro. Abr., tit. Pet. 26.

cided that an *advowson* of which a subject had been deprived by the usurpation of the Crown could be recovered back by a petition of right in the nature of a *Quare impedit.*

The following is apparently the earliest case upon the subject:—

"S. C. sued a petition to the king, alleging that whereas M. P. was seized in fee of an acre of land in T., and of the advowson of The Church of T. appendant, and gave the land and the advowson with a warranty to the plaintiff in fee, and that the king by reason of his wardship of the heir of M. had presented W. of H. who was received and instituted, and forasmuch as the heir has assets by descent, and that the plaintiff is ousted of his advowson without response which is clearly contrary to Magna Charta, &c., therefore he sues his petition; and the bill of petition was sent (bayle) into the Chancery commanding that right should be done (*droit soit fait*), and there the other said that the land and advowson was in tail, to which the other pleaded in reply the warranty and the assets, whereupon it was prayed for the king that the pleadings might be stayed because of the heir's nonage, but non allocatur; for this petition is in lieu of *Quare impedit*, in which action, because of the effect that a lapse of six months has, and for reasons of that sort, age cannot be pleaded; and also because the heir is not a party, but the king, whereupon he was called on to answer without pleading age. And note that before another plea was pleaded 'Scire facias' issued against the king's presentee 'ad informandum dominum regem,' and afterwards because the king's presentee would not maintain that the heir had nothing by descent, the presentation was repelled *quod nota*"(*y*).

In reading the above case it should be borne in mind that at the time it was decided, not only did the patron by

(*y*) 43 Assize, plea. 21; Bro. Abr., tit. Pet. 18.

succeeding in *Quære impedit,* recover the very presentation in dispute, but, by such recovery, the seisin of the advowson also (*z*), so that an incorporeal freehold right was recovered.

There are also other cases and dicta which distinctly recognise the same right (*a*).

Seigniories.

(4.) A *seigniory* (*b*) has also been recovered by this process. Thus a certain manor was seized into the king's hand as forfeit by reason of R. H.'s treason, whereupon the king gave it to one R. in fee to hold of him and his heirs (*i.e.*, the king and his heirs), and R.'s son and heir dying his sons within age, the king seized the wardship, and ousted R. D., whose free tenant R. H. was before the forfeiture. Held, that upon R. D. suing to the king by petition to be restored to the seigniory aforesaid he could recover (*c*).

Gales.

(5.) To this portion of the subject belong those petitions (*d*) which have been brought since the passing of the Petitions of Right Act in connection with grants of "*gales*" in the Forest of Dean.

(*z*) 13 Ed. 1, c. 5, s. 2; Stephen's Blackstone, 8th ed., vol. iii., p. 429, *seq.*

(*a*) Y. B. 8 Hen. 4, 21; Bro. Abr., tit. Pet. 44; Y. B. 2 Hen. 4, 17; Bro. Abr., tit. Pet. 5; Y. B. 10 Hen. 6, 15; Bro. Abr., tit. Pet. 36; Assize, 10 Hen. 6, 15; Fitzherbert's Abridgment, tit. Pet. 7; Fitzherbert's Abridgment, tit. Assize, 40 and 75.

(*b*) "Of such of the lands of a manor as the lord granted out in fee simple to his free tenants nothing remained to him but his seigniory or lordship. By the grant of an estate in fee simple he necessarily parted with the feudal possession. Thenceforth his interest accordingly became incorporeal in its nature. He had not reversion, but the grantee became his tenant did to him fealty and paid to him his rent service, if any were agreed for. This simply being a free tenant in fee simple was called a seigniory" (Williams' Real Property, 12th ed., 322).

(*c*) Fitzherbert's Abr. tit. Pet., 19; Y. B., 46 Ed. 3; Staunford's Prerog., cap. xxii., fol. 75 a.

(*d*) All that is meant by placing these cases in their present position is that in virtue of the subject matter which they were brought to recover they belong to this portion of the work. Whether the methods employed to recover, viz., by claiming a declaration in Chancery were correct, seems open to question: see Chapter on Petitions in Equity, *infra.*

A gale may be shortly described as a grant from the Crown in fee simple, subject to certain conditions, of tracts of coal or iron ore or stone lying under the forest paying only a royalty therefor (*e*).

The nature and quality of the estate so acquired has been settled by statute (*f*) in the following words: "The grant of a gale of coal or iron or of a stone quarry shall be deemed to have conferred and shall confer on the galee, his heirs and assigns, a licence to work the mine, vein, or pit therein comprised, and such grant shall be deemed to have conferred on the grantee, his heirs and assigns, an interest in the nature of real estate."

These words seem to constitute a gale an incorporeal hereditament. The first of these cases was that of *James* v. *The Queen* (*g*), decided by Vice-Chancellor Malins in 1874. There the suppliants were the devisees upon trust of all the real and personal estate of one James Davis, a free miner of the Forest of Dean, who had died after making an application for, but before receiving a grant of a certain gale from the Crown. Under these circumstances the suppliants contended that the gale passed to them under the general devise above mentioned, and brought their petition praying "that by virtue of the application of the said James Davis the said James Davis was entitled to have the gale in question granted to him in priority to and to the exclusion of all other free miners of the said hundred, and that such gale ought accordingly to have been granted to him previous to his decease: and that it might be declared that under the circumstances aforesaid the said gale ought now to be granted to the suppliants in right of the said James Davis, deceased, upon the trusts of his will: and that the

(*e*) Laws of the Dean Forest Wood, 1878, p. 6.
(*f*) 24 & 25 Vict. c. 40, s. 1.
(*g*) L. R. 17 Eq. 502; 43 L. J. Ch. 754; 30 L. T. 84; 22 W. R. 466.

same might accordingly be granted by the gaveller or deputy gaveller to the suppliants as such trustees as aforesaid."

To this bill a demurrer was put in by the Attorney-General on the ground that it was not alleged by the petition that the suppliants were free miners: that the application made by J. Davis for the therein mentioned gale had not conferred on the suppliants a title to any gale, and that the suppliants had not made any case entitling them to relief.

This demurrer the Vice-Chancellor overruled with costs.

Upon the action coming on for hearing in June, 1876, the point that a gale could not be granted to those who were not free miners was again taken before the Vice-Chancellor, but, notwithstanding this, an order was made in pursuance of the prayer of the petition that the gale should be granted to the suppliants.

From this order the Crown appealed (*h*), and the appeal came on for hearing in March, 1877, with the result that the Court reversed the decision of the Vice-Chancellor both on the ground that not having obtained the grant of the gale it did not pass under the will of James Davis, and, secondly, because had he obtained it, it could not pass to his devisees, not being free miners.

The other case was *In re Brain* (*i*), in which the facts were shortly as follows. The suppliants were the grantees of a certain gale from John Brain, who, in 1864, had obtained a grant of the same from the Crown upon certain conditions, one of which was the payment of a certain dead rent of £200 per annum.

The suppliants having neither worked the gale nor for

(*h*) *James* v. *The Queen*, L. R. 5 Ch. D. 153; 46 L. J. Ch. 516; 36 L. T. 903; 25 W. R. 615.

(*i*) L. R. 18 Eq. 389; 44 L. J. Ch. 103; 31 L. T. 17; 22 W. R. 867.

several years paid the aforesaid rent, the Crown, in 1871, declared the gale forfeited, and expressed an intention of regaleing or regranting the same to one Gwilliam. On the 14th June, 1872, on the day previous to the grant to Gwilliam, the suppliants tendered the rent in arrear, which however was not accepted by the representative of the Crown, who insisted that the suppliants had forfeited all right to the property, the subject of the gale, but at the same time postponed the grant to Gwilliam until the middle of the ensuing month.

Under these circumstances the suppliants presented their petition to the Court praying "a declaration that the forfeiture of the 17th of July, 1871, was illegal and of no effect: or if it should appear to the Court that the forfeiture was valid, then, upon payment of all arrears of rent due in respect thereof, with interest thereon, the suppliants might be relieved from the effect of such forfeiture, and might be restored to the possession of the gale; and that in the meantime the representative of the Crown might be restrained by injunction from granting the gale to Gwilliam or any other person without the consent of the suppliants.

The Court, however, held that there had been a legal forfeiture and a right of the Crown to re-enter, and that the arrears not having been tendered nor any proceedings taken within six months, it had no power to relieve against the forfeiture, and that therefore the petition must be dismissed with costs.

Although each of the foregoing cases was decided against the suppliant upon the merits, yet as no objection was taken on behalf of the Crown to the suppliants' method of proceeding, these cases amount to a sort of tacit admission that it was correct.

Personal Property.

Personalty.

We have next to consider

Chattel Interests in Land.—It has been decided that a tenant under a statute merchant can, if ousted by the Crown, recover his interest therefrom by petition of right (*k*), and also that a tenant for years can recover his term in like manner (*l*), and it has been stated generally that a petition of right can be sued for a chattel real in the same manner as for a freehold (*m*). (1) impure.

There is, happily, more modern authority upon this point than is contained in the foregoing cases.

Recently (1880) there has been a case before the Chancery Division of the High Court in which leaseholds have been recovered from the Crown; the case referred to is *In re Gosman* (*n*).

In that case the suppliant was one of the next of kin of William Brownlie, and presented his petition on behalf of himself and the other next of kin under the following circumstances.

William Brownlie, who was possessed of numerous leasehold houses and of other personal property of very considerable value, devised and bequeathed the same to trustees upon certain trusts, which were so doubtful that upon a suit being instituted it was decided that the residuary bequest was void, and that the leasehold property in default of there being next of kin of the testator, belonged to

(*k*) 37 Lib. Ass., p. 11; Bro. Abr. tit. Pet., 17. The note of the report ending with these words: "Et hīc vide que tenant per statute merchant que nad que chattell real poit aver peticion, sil soit touste et avera restitution et ideo videt mihi quod eadem lex est d'un termor." A statute merchant was a real security much in the nature of a mortgage.

(*l*) Y. B. 9 Hen. 6, 2; Bro. Abr., tit. Pet. 2.

(*m*) Y. B. 7 Hen. 7, 11; Bro. Abr., tit. Pet. 24.

(*n*) L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 29 W. R. 14.

the Queen, and that possession should be delivered to such person as her Majesty should by warrant under sign manual appoint. In consequence of this decision by a warrant under her Majesty's sign manual dated the 18th of December, 1872, it was directed that the leasehold estate of which the testator died possessed should be assigned to John Gray, the solicitor to the Treasury, and by an indenture dated the 31st of May, 1873, between the trustees of the one part and John Gray of the other part, the said leasehold estate was assigned to John Gray as a trustee for her Majesty.

A petition of right was presented by James Gosman on behalf of himself and others on the 2nd of December, 1873, by which the suppliant claimed to be one of the next of kin of the testator as being his second cousin once removed, and the suppliant prayed "that it might be ascertained under the direction of the Court who were then the next of kin of the testator, and, upon such next of kin being ascertained, that it might be declared that they were entitled to the leasehold estates of which the testator died possessed. And thereupon that her Majesty would be pleased to direct by a warrant under her sign manual that the said John Gray should reassign the said leasehold estates to the parties so found entitled thereto, and that he should account to the suppliant and other the next of kin of the testator for the several sums of money received by him in respect of the rents of the said leasehold premises prior to the 31st of May, 1873, and also the rents received since that date."

Upon this petition of right coming on to be heard, an order was made by the Court on the 21st of February, 1878, for inquiries according to the prayer, and in pursuance of that decree the Chief Clerk found that the suppliant and certain other persons were the only next of kin of the testator, William Brownlie, living at his death on the 14th of

February, 1864, being second cousins once removed; and to them the leaseholds were accordingly re-assigned (*o*).

Who takes the mesne profits.

Where, however, property is recovered from the Crown a further question may remain whether, upon a judgment for restitution being given and the suppliant restored to possession, the Crown is accountable for the mesne profits received from the property during its possession.

The Common Law doctrine

The law upon this subject seems to be as follows: "By the Common Law, although the seizure (by the Crown) was not lawful, yet, for the mesne profits upon the livery or 'ouster le main,' the party grieved was not restored to the mesne profits" (*p*).

was modified by statute 28 Ed. 1, c. 19,

To remedy this inconvenience it was enacted by the statute articuli super chartas (*q*): "That from henceforth where the escheator or the sheriff shall seize other men's lands into the king's hands (where there is no cause of seizer), and after, when it is found no cause, the profits taken in the meantime have been still retained and not restored when the king hath removed his hand: the king will that if hereafter any lands be so seized and after it be removed out of his hands by reason that he hath no cause to seize nor to hold it, the issues shall be fully restored to him to whom the land ought to remain, and which hath sustained the damage."

and 29 Ed. 1.

And by the statute "de escheatoribus," commonly known as the Statute of Lincoln, it was further enacted in the following year (29 Ed. 1): "That where inquests taken by the king's escheators by any of the king's writs, purchased out of the Chancery, being returned, and it be found by such that nothing is holden of the king whereby the king

(*o*) The further question which arose in this case as to the right of the suppliants to the restitution of certain cash with mesne profits and interest is considered later on in this work.

(*p*) Coke, 2 Inst. 572.

(*q*) 28 Ed. 1, c. 19.

ought to have the custody of such lands and tenements by reason of the inquests taken by his escheators that immediately and without any delay the escheators shall be commanded by the king's writ out of the Chancery, to put from their hands (manum suam amoveant) all the lands and tenements so taken into the king's possession; and if they have taken any profits of such lands and tenements so taken into the king's hands by them from the time that such lands and tenements fell into the king's hands, they shall make full restitution to him or them for whom it was found by inquests taken by the same escheators that such lands ought to remain." . . . "And as it is said before if it be found by inquests taken by the escheators and returned, that the custody of the same lands and tenements contained in the inquest and seized into the king's hands, ought not to remain unto the king, then the escheator shall be commanded forthwith to discharge his hands thereof, and to restore the issues wholly."

Lord Coke's interpretation of these statutes.

The fifth of the "ten points" which Coke says (*r*) "are to be observed upon these statutes," is that "these statutes extend by equity to 'ouster le main' and 'amoveas manus' upon petitions, and 'monstrans de droits' not only in cases concerning wardship, but freehold and inheritance;" (*s*) and, for this proposition, quotes 24 Ed. 3, 33 and 9 Ed. 4, 52; Kelway, 1 H. 8, 156; but, as the second of the ten points is, that "issues are intended rents and things leviable by the escheator, which may be restored though the escheator hath accounted for them, and not paid; but the money being once in the king's coffers shall not be restored," the statutes

(*r*) 2 Inst. 572.

(*s*) "And where the letter (of this statute) goeth only to the cases where the King seizeth before office, making no mention of an 'ouster le main' to be granted upon any petition traverse or monstrans de droit, 'yet men by an equitie extend this statute both to the one and to the other, because the statute is beneficial" (Staunford's Prerog., cap. xxvi., fol. 82).

are not so beneficial to the subject as they appear at first sight, since, according to this interpretation, only such part of the issues and profits as have not been paid in at the receipt of Exchequer can be restored.

Supported by Lord Somers in the *Bankers' Case.*

And this interpretation of the statutes seems to be the right one; thus, Lord Somers, in his argument upon the *Bankers' Case*, observes as follows (*t*): "The judgments given by the barons in these cases are not consistent with another known maxim: that when once money is paid into the receipt of the Exchequer no Court has any power over it, nor is there any legal method to fetch it back again; although, in several cases, if it had not been actually paid into the receipt it might have been restored to the party. To this purpose nothing can be more strong than the common cases of reversals of outlawries and judgments; where, though by the judgment of reversal the party is to be restored to all that he has lost, yet whatever has been actually brought into the receipt of the Exchequer is gone past redemption, and yet, when the judgment or outlawry is reversed, it is to all purposes as if it had never been. And these are cases of restitution which are most favoured in law and the relief extended as far as possible. In like manner when upon an office or inquisition a title is found for the king and the mesne profits are paid into the receipt, if upon a 'traverse' or 'monstrans de droit' judgment be afterwards given for the subject, and an 'amoveas manus' awarded, yet as to profits paid into the receipt there shall be no restitution. This is so well known that in cases before the barons where there is a question touching the profits of an estate whereof the title is found for the king, if they conceive a doubt upon a suggestion of a subject's right which may hereafter appear, they will in discretion direct the money to remain in the Chamberlain's hands

(*t*) 14 Howell's State Trials, 71, *seq.*

some time and not to be paid immediately into the receipt, because when it is once there it is out of their power and cannot be brought back again.

"As to the cases of money levied upon offices or inquisitions found, my Lord Chief Justice observed that there was a difference between a judgment upon a petition of right and a judgment upon a traverse or a 'monstrans de droit.' That in the first case the judgment was general 'that the king's hands should be amoved and the party restored to the possession;' but in the other case the judgment was 'that the party should be restored una cum exitibus et proficuis inde medio tempore perceptis,' and so he compared a judgment upon a petition of right to a real action at common law against a subject in which there were no damages, and a judgment on a 'monstrans de droit' to a possessory action in which damages were recovered at law.

"To this I answer that the cases of subjects are not to be compared to the case of the king; and that at the common law before the statute of 'articuli super chartas,' the subject in no case of 'amoveas manus' could have any judgment for restoring issues however false the office appeared, as Sir Edward Coke expressly affirms. But be that as it may, yet this distinction makes nothing to the present question. For in cases of 'monstrans de droit' or 'traverses' where the judgment is to restore the party to the mesne profits, it is generally expressed 'unde dicto domino regi nondum est responsum,' and where these words are omitted the same are understood. If the profits remain in the tenant's hands, or if they are *in transitu* in the hands of the receivers, though the receivers have accounted for them, the party is restored to them: but if they are answered into the receipt they are lost to him. This is affirmed by my Lord Chief Justice Coke in his commentary upon the statute of 'articuli super chartas' c. 19 [2 Instit. 572, 573], which act

was made 28 Ed. 1, and the 'statute de escheatoribus,' which was made the year following. And yet the words of the statute are very full, that upon an 'ouster le main,' because there was no cause to seize 'soient les issues pleinment rendus a celui a que la terre demurt, et avera le damage resceive.'

"There are many of these judgments upon 'traverses' and 'monstrans de droit' to be found upon record, where the party is to be restored to the possession 'una cum exitibus et proficuis inde medio tempore receptis.' If it could be made to appear that upon any such judgment money was paid back out of the receipt of the Exchequer, or if any writ could be produced requiring the treasurer and chamberlains to make restitution, it would be to me a much more cogent argument than any new plausible reason which may be assigned. But of this there is no footstep in any ancient or modern book. If it never was done, the old known reason will best serve our turn, that it was because the money was paid into the receipt, and then no Court had power to intermeddle with it."

The decision in *Oldham* v. *Lords of the Treasury*.

That this continued to be the law until recently appears from the judgment of Graham, B., in *Oldham* v. *Lords of the Treasury* (*tt*), in which the following passage occurs:

"The jurisdiction of the Court of Exchequer extends only to the reaching the moneys which come into the Treasury while they are *in transitu:* but after Parliament has disposed of them, and they have reached their destination, the jurisdiction of the barons ceases, and here the king alone can order the payment of the money."

After this statement of what appears to be the law upon this point, it remains to be seen whether in any particulars it has been relaxed in modern times.

It has never apparently been altered by statute, but the

(*tt*) 6 Sim. 220.

The modern practice.

Court on one occasion intimated that "it was likely that such a rule would not prevail if the question arose now" (*u*).

In re Gosman.

The only case in which this question has recently arisen is the case of "*In re Gosman* (*uu*)," the circumstances of which have been given in the previous pages. In that case not only were the leaseholds themselves sought to be restored, but the prayer of the petition also claimed "that the Treasury solicitor should account to the suppliant and other the next-of-kin of the testator, for the several sums of money received by him in respect of the rents received from the date of the assignment of the property to him to the time of the petition."

Unfortunately in this case it was taken for granted that the suppliant was entitled to the mesne profits, and no question was raised as to them, although the money had been so far paid into the Exchequer that it had been expended in reducing the National Debt or in public purposes, Mr. Rigby, in arguing for the Crown, intimating that there was no doubt upon the point.

If, however, the money had been applied as stated in the case, there seems to be considerable doubt whether it should be restored. No doubt the difficulty which existed in Lord Somers' day of an absence of any machinery for taking the money out of the Exchequer when once it had been paid in, does not exist now, as the suppliant is paid by the Commissioners of the Treasury the sum which the judge certifies to be due to him, and if the judge certifies for mesne profits, that, it is presumed, would be a sufficient warrant to the Commissioners to pay them; but, on the other hand, it should be remembered that the Act was not to enlarge

(*u*) *Tobin* v. *Reg.*, 16 C. B. (N.S.) 310, at p. 359; 33 L. J. (C.P.), at p. 208; 10 L. T. 762, at p. 765; 12 W. R. 838, at p. 842; 10 Jur. (N.S.) 1029, at p. 1033.

(*uu*) L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 29 W. R. 14.

the subject's rights against the Crown, and if the suppliant was not entitled to them before the Act, surely he should not be paid them now solely because the Act has made it possible.

We now come to the consideration of pure *chattels.* (2) Pure chattels.

We have already seen that in Staunford's general statement of the uses of petition of right, chattels as well as lands could be recovered from the king's hands by this process. Later on in his treatise, he reiterates this statement in these words: "As I said in the beginning, a man shall have his peticion for goods as well as for lands as where the escheator seizeth goods of one that is outlawed, and hath accompted for them in the Exchequer, and afterwards the outlawry is reversed, in this case the party hath no remedy for his goods, but only by peticion. And this case you shall see in T. 34, H. 6, f. 51. Howbeit Catesby and Hussey hold opinion to the contrary hereof" (*v*).

Subsequent text-writers have agreed with him, but it is not so easy to find out at what date this decision was arrived at, since there seems little doubt that at one time this was not so: for instance, the foregoing passage concludes with a dictum delivered in the reign of Henry VII., that petition was not at the common law of chattels but only of freeholds (*x*), an opinion which had also been expressed some time previously (*y*). However this may once have been, we find in the reign of Henry VI. all the justices agreeing that "a man shall have petition to rehave his goods and chattels, in case where the escheator, virtute officii, seizes goods and accounts for them in the Exchequer; or if a man be outlawed and the escheator accounts for his goods in the Exchequer, and afterwards the party reverses the outlawry

(*v*) King's Prerogative, Peticion, cap. xxii., fol. 76.
(*x*) Y. B. 1 Hen. 7, 3, *per* Catesby; Bro. Abr. tit. Pet. 19.
(*y*) Y. B. 13 Ed. 4, 8; Bro. Abr. tit. Pet. 30.

by writ of error or the like, in these cases and the like he shall have his petition, and the king shall indorse the petition in such form, "soit droit fait as parties" (*z*). And this latter view Staunford considers is the correct one (*a*).

There is one reported case which is very frequently quoted, and that a very early one, in which this jurisdiction has been exercised: which is the "Case of Conrad of Colerne" (*b*). There the suppliant had joined a Dutchman in sending a cargo of oats to London which were shipped from Cornwall in the Dutchman's ship, and when it arrived in London war had been declared between England and Holland. The ship and cargo were seized as the property of an enemy; but as half the cargo belonged to the Englishman he petitioned for its recovery, and obtained it.

The Court in the case of *Tobin* v. *Reg.* (*c*) considered this a case of the recovery of a specific chattel, and supportable upon that ground.

If lost or destroyed, can their value in money be recovered.

There do not appear to be any very recent cases upon this branch of the subject, but a further question may arise with respect to the restitution of chattels which cannot arise in the case of real property, which is this: supposing that during the time the chattels are in the wrongful possession of the Crown, that they are either lost or destroyed, so that the owner cannot recover them in specie, is his remedy therefore gone, or can he recover the value of them in money from the Crown?

It is unfortunate that we derive so little assistance from considering an analogous case, with regard to land which had been converted to the Crown's use pending the trial of

(*z*) Y. B. 34 Hen. 6, 51; Bro. Abr. tit. Pet. 3.

(*a*) Prerog., cap. xxii., fols. 75 b, 76.

(*b*) Mem. in Scaccario, 4 Ed. 1.

(*c*) *Tobin* v. *Reg.* 16 C. B. (N.S.) 310, at p. 362; 33 L. J. (N.S.) 199, at p. 209; 10 L. T. 762, at p. 766; 12 W. R. 838, at p. 843; 10 Jur. (N.S.) 1029, at p. 1034.

the petition. In such cases the suppliant could still come by his own by obtaining the issue of a writ of "scire facias" (*d*), or suing a petition for the repeal of the letters patent (*e*) by which the grantee had been put into possession; and it was only the grantee who had thus been put out of possession by the "scire facias" that could recover from the Crown upon his clause of warranty the value of the lands he had lost (*f*).

Upon the express point itself there seems to be no reported authority, but there are certainly dicta in favour of the subject's recovering the value. Thus the Court of Common Pleas in *Tobin* v. *Reg.* distinctly stated, as we have seen, that a judgment in favour of the suppliant upon petition of right "enabled him to recover possession of specific property, *or the value thereof, if it had been converted to the king's use*" (*g*); and the Court of Queen's Bench repeated this opinion with additions when, in summing up the cases in which the remedy by petition was available, they included those in which the purpose of the petitioner is to obtain "*compensation in money*" if restitution (in specie) cannot be given (*h*).

Against this, however, it may be urged that such recompense or compensation would in such a case be in the nature of damages for conversion, that is for a tort (*i*): for which the Crown is not, as we have seen, liable.

(*d*) Y. B. 8 Hen. 4, 21; Bro. Abr. tit. Pet. 8; Y. B. 9 Ed. 4, 51; Bro. Abr. tit. Pet. 37.

(*e*) Y. B. 21 Ed. 3, 47; Bro. Abr. tit. Pet. 11.

(*f*) Y. B. 9 Hen. 6, 3; Bro. Abr. tit. Pet. 1; *Thomas* v. *Reg.* L. R. 10 Q. B. 31, at p. 36; 44 L. J. Q. B. 9, at p. 13; 31 L. T. 439, at p. 441; 23 W. R. 176, at p. 178.

(*g*) 16 C. B. (N.S.) 310, at p. 358; 33 L. J. (C.P.) 199, at p. 207; 10 L. T. 762, at p. 765; 12 W. R. 838, at p. 842; 10 Jur. (N.S.) 1029 at p. 1033.

(*h*) *Feather* v. *Reg.* 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114.

(*i*) Dicey's Parties to an Action, pp. 23–24.

Money.

Money,

The whole of the authority upon the question whether money is recoverable from the hands of the Crown is contained in a few modern decisions.

The first (*k*) time that money was sought to be recovered from the hands of the Crown was in the *Baron de Bode's Case* (*l*), and the point was then taken that only lands or goods were recoverable by this process and not money. Lord Denman, however, in giving judgment upon this part of the case, said as follows: "The position of the suppliant is this, that money has been received by the Crown in trust for and to the use of the suppliant. The Crown urge that supposing all this is true (which they deny) still no judgment can be given for the suppliant, as a petition of right is maintainable for no other objects than land or specific chattels, certainly not for a sum of money claimed either as debt or by way of damages. Upon this point we may observe that there is nothing to secure the Crown against committing the same species of wrong—unconscious and involuntary wrong—in respect of money which founds the subject's right to sue out his petition when committed in respect of land or specific chattels, and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong."

formerly doubtful whether it could be recovered.

In accordance with this expression of opinion are later

(*k*) In *Ryves* v. *The Duke of Wellington*, 9 Beavan, 579; 15 L. J. Ch. 461; 10 Jur. 697; which was a suit by an executor of a daughter of the Duke of Cumberland against the defendant as executor of George IV., to recover a legacy which had been left by the will of George III. to the plaintiff's testator, it was suggested by Langdale, M.R., that the proper remedy was by petition of right to George IV.; and also see dictum of Graham, Baron, quoted in *Ellis* v. *Earl Grey*, 6 Sim. 220, as to the recovery of a pension by this means.

(*l*) 8 Q. B. 203; 10 Jur. 208.

cases in which money has been recovered from the Crown by this process.

The most usual way in which, at the present day, a subject's money finds its way wrongfully into the hands of the Crown is when it is paid to the Crown under a mistake, and under protest in the form of duty or tax. In such cases, should the tax or duty prove to have been wrongly levied, the whole or part of the amount so paid appears to be recoverable upon a petition of right.

Recent cases in which money paid under mistake has been recovered: *Percival* v. *Reg.* *Perry* v. *Reg.*

Thus, in the case of *Executors of Percival* v. *The Queen* (*m*), (1864) the suppliants were allowed to proceed without question under the "Petitions of Right Act, 1860" (23 & 24 Vict. c. 34), for the return of the difference in excess of £150 on account of stamp duty paid on probate by the suppliants, and upon the merits they were successful.

Again, in the case of the *Executors of Robert Cobbold Perry* v. *The Queen* (*n*), in which the suppliants sought the repayment of a sum of £750 paid in respect of property which was not their testator's property at the time of his death, as it was bequeathed to him by his father who survived him, the same procedure was adopted, but unsuccessfully, the Crown succeeding upon demurrer.

De Lancey v. *Reg.* *Crossman* v. *Reg.*

The case of *De Lancey* v. *The Queen* (*o*) is a further illustration of the foregoing principle; and lastly, in the case of *Crossman and Another* v. *The Queen* (*p*) (the details

(*m*) 33 L. J. (Ex.) 289; 3 Hurls. & C. 217; 10 Jur. (N.S.) 1059; 10 L. T. 622; 12 W. R. 966.

(*n*) L. R. 4 Ex. 28; 19 L. T. 520; 17 W. R. 382; S. C. *Bacon* v. *Reg.* 38 L. J. (Ex.) 5.

(*o*) L. R. 6 Ex. 286; L. R. 7 Ex. 140.

(*p*) L. R. 18 Q. B. D. 256; 35 W. R. 303; 55 L. T. 848; *Times*, 22nd December, 1886:—BEFORE MR. JUSTICE DENMAN AND MR. JUSTICE HAWKINS. CROSSMAN AND ANOTHER *v.* THE QUEEN. This was a case stated pursuant to the Petitions of Right Act, 1860, and Order XXXIV., rule 1, under a consent order made on May 13, 1883. The question at issue was whether the Crown was entitled to take from the sup-

of which are given below), it was recognised and acted upon.

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pliants stamp duties on accounts under s. 38 of the Customs and Inland Revenue Act, 1881, or (in the event of no such duties being payable) succession duty, or neither of such duties. It was admitted on behalf of the Crown that the succession duty, if payable, would be at the rate of 1 per cent. only. The suppliants were two of the sons of Robert Crossman, who was formerly a partner in the great brewing business carried on under the style of Mann, Crossman, & Co., and who died on July 19, 1883. In October, 1873, the partners were the late Mr. Robert Crossman, Mr. Thomas Mann, and Mr. James Hiscutt Crossman, one of the present suppliants, and Alexander Crossman, the other, Mr. Thomas James Mann, and Mr. William Thomas Paulin; and by the indenture of partnership then entered into between the parties, the property of the late firm was to be deemed to be of the net value of £320,395. The capital of the new partnership was to be divided into eight shares, whereof two were to belong to Mr. Robert Crossman, two to Mr. Thomas Mann, one each to Mr. J. H. Crossman, Mr. Alexander Crossman, Mr. Thomas James Mann, and Mr. W. T. Paulin. Each partner was to bring into the capital of the partnership in respect of each one-eighth share therein to which he might be entitled the sum of £50,000, and the sum of £320,395 was to be considered as belonging to and having been brought in by the partners in the following proportions, viz:—£100,000 by Mr. Robert Crossman, £100,000 by Mr. Thomas Mann, and the remaining £120,395 by the other four partners. In and previous to 1879 and 1883 negotiations took place between the late Mr. Robert Crossman and his two sons, the suppliants, with reference to the transfer to them of the two shares belonging to him, the father. In the result an agreement was come to between them on July 12, 1883, by the terms of which the father was to transfer his two shares to his sons, they paying him 4 per cent. on their value during his life, and on his death £2,000 a year to his widow, and £100 a year to a third son of Mr. Robert Crossman. Mr. Robert Crossman died almost immediately after the deeds had been executed, and in January, 1884, the suppliants by mistake, as they now alleged, paid to the Commissioners of Inland Revenue the sum of £3,777, being 3 per cent. on £125,823 10*s.*, the assumed value of their deceased father's two shares. It was agreed that if the Court were of opinion that some duty (under the head of account duty or succession duty) was payable, then the difference (if any) between the said sum of £3,777, and the amount of duty, or if the Court were of opinion that no duty at all was payable, then the whole of the said sum with such interest as the Court should think fit, should be repaid to the suppliants. The questions for the opinion of the Court were whether (1) stamp duties on the accounts were payable by the suppliants under the circumstances,

It has not been thought necessary to state in the above cases the facts upon which each one proceeded; but in none of them was any question raised as to the right of the suppliant to adopt the form of remedy given by the Petitions of Right Act.

Mesne profits thus recovered.

The principle would seem, also, to extend to other cases where money has wrongfully found its way into the hands of the Crown thus: in the recent case of *In re Gosman* (*q*), the particulars of which have been given above, a sum of over £6000, being the accumulated rents of certain leasehold property which in default of next of kin had passed into the hands of the Crown, was recovered by a suppliant upon petition of right.

Salary.

And in the year 1869 (*r*) a question relating to salary which had arisen between the Crown and one of its servants was adjusted by this process. There Arthur Burke, Esq., Master of the Court of Queen's Bench in Ireland, sued by petition of right to raise a question as to the amount of salary to which he was entitled. The question arose thus: He had been prothonotary, with a salary of £1500 Irish, equal to £1384 currency. The office was abolished, and he was made Master with a salary of £1000, with a condition

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under s. 38 of the Customs and Inland Revenue Act, 1881, or no duty was payable under that section; and whether (2) succession duty was payable by the suppliants. The whole question in the case was whether the deed of July, 1883, was a voluntary settlement by Mr. Robert Crossman or, as the suppliants' contention was, one for good consideration.

The Court held that it was a voluntary settlement, and that therefore the Crown was entitled to stamp duty upon the amount of the value of the late Mr. Robert Crossman's two shares.

Judgment accordingly for the Crown with costs.

Sir Horace Davey, Q.C., and Mr. Danckwerts were for the suppliants; the Attorney-General (Sir R. E. Webster, Q.C.), the Solicitor-General (Sir Edward Clarke, Q.C.), and Mr. A. V. Dicey appeared for the Crown.

(*q*) L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 29 W. R. 14.

(*r*) *Burke* v. *Reg.*, *Times*, 29th May, 1869.

in the Act that he should receive in addition the difference of £384 sterling. A subsequent Act had increased the salary of Master to £1400 a year, and the question was, whether he was still entitled to the additional sum of £384 a year.

Mellish (with him, Mr. Philbrick), argued for the claimant.

The Attorney-General (with him, the Solicitor-General and Mr. Archibald), argued for the Crown.

The Court decided in favour of the claimant, on the ground that the £384 a year was given by way of compensation for the loss of the former office, and gave judgment for the claimant for the amount in question.

Closely connected with this portion of the subject, but slightly differing in principle from the foregoing cases, is a recent case (*s*) in which tolls were sought to be recovered from the Crown, the details of the case are as follows:

Tolls. The Northam Bridge Company was constituted by an Act of 1796 for the purpose of making a bridge and road across the Itchen at Northam, within the liberties of the town and county of Southampton, and also authorized to make certain roads as approaches to the bridge and to charge tolls. The Post Office authorities had paid tolls to the company in respect of their mails until the commencement of the year 1885. By sect. 53 of the Act of 1796 the company's roads are to be deemed turnpike roads within the meaning of the General Turnpike Act of 1773 and Acts made for the purpose of explaining, amending, or repealing the same. By an Act of 1785 mails are exempted from the payment of turnpike road tolls. The company relied on the point that the Act of 1785 was not, within sect. 53 of the Act of 1796, "made for the purpose of ex-

(*s*) *Northam Bridge Company* v. *The Queen*, *Times*, 24th of Nov. 1886.

plaining, &c., the Act of 1773," and the petitioners also submitted that the inference to be drawn from divers repealing Turnpike Acts when read with the Acts of 1785 and 1796, was that the Act of 1785 was repealed so far as it affected the Act of 1796. The Crown demurred, and relied on the Act of 1785 if necessary, but also took the general ground that the Crown's right to be exempt from all tolls, except such as were demanded of the Crown for traversing private ways, could not be barred, except by express mention to that effect contained in the patent, grant, charter, or Act of Parliament creating the way.

The Attorney-General (Sir Richard Webster, Q.C.), the Solicitor-General (Sir Edward Clarke, Q.C.), Mr. C. T. Simpson, and Mr. Casserley appeared for the Crown in support of the demurrer; and Mr. Macnaghten, Q.C., and Mr. F. Pollock, for the suppliants.

Mr. Justice Chitty delivered a written judgment dealing *seriatim* with the various Acts of Parliament, and held that the Act of 1785, replaced as it was by the Post Office Management Act, 1837, dominated the Act of 1796 in all the respects in which the suppliants had contended the contrary. He therefore held that the suppliants were not entitled to any relief under their petition of right. He added that the circumstance of the Postmaster-General having acquiesced in the payment of tolls for a period approaching to a century did not in any manner affect the construction to be arrived at on the Acts of Parliament. When regard was had to the statement in the preamble of the Post Office Management Act, 1837, as to the laws of the Post Office having then become intricate by reason of successive alterations and additions, and also regard paid to the abstruse and involved expressions of some of the enactments with which he had been dealing in the present petition of right, it might well be supposed that the preservation of this

right to exemption had been overlooked by the Postmaster-General. But, however that might be, usage or long-continued practice could not in law have any effect upon the Acts of Parliament in question.

Demurrer was allowed, with costs to be paid by the suppliants.

Interest.

Interest on money taken apparently not recoverable.

A further question has arisen whether, in the event of the Crown being held liable to restore money which has come into its possession, it is also liable to pay interest upon the same for the time during which it has wrongfully had possession of the same.

As interest may be considered as the "mesne profits" of money in the same way as rent is of land, it is not, perhaps, too much to consider it amenable to the same rules as regulate the repayment of the mesne profits of land, and only to be repayable under like conditions.

Apart from these considerations, however, it should be remembered that, setting aside mercantile instruments, interest is not payable at all at Common Law, but is only paid under statute or when expressly contracted for; and that, as it is presumed the Crown would not be bound by the statute, it must be seen whether it has contracted to pay it, and, if not, it will not be payable (*t*).

This was the view taken by the Court of Appeal (Jessel, M.R., and Baggallay and Lush, L.JJ.), in the case of *In re Gosman* (*u*).

There the question was whether interest should be paid by the Crown on a certain sum of money, being the accumulated rents of certain property which had come into their hands, and which it had been held liable to repay upon petition of right.

(*t*) 3 & 4 Wm. 4, c. 42, s. 28.

(*u*) L. R. 17 Ch. D. 771; 50 L. J. Ch. 624; 45 L. T. 267; 29 W. R. 793.

In the Court below it was argued for the Crown that interest ought not to be paid because the fund had not been invested; and the Vice-Chancellor Malins decided that it ought, "because the Crown, or, rather, the British public, have had the advantage of the use of the money, and, having had that advantage, in my opinion they are bound to pay interest upon it, whether it has come to their hands in one way or in another." (*x*)

In the Court of Appeal, however, the judgment was simply as follows: "There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract."

Money paid to the Crown for the benefit of a subject not recoverable upon petition.

But, though by the foregoing cases it would seem that money of the suppliants, which has been paid into the hands of the Crown, may under certain circumstances be recovered back, even although the sum is not earmarked, so as to be restored as it were in specie: still, it must not be supposed that in cases in which this relation does not subsist between the subject and the Crown, and the latter has merely received money from some third party, for the benefit of the subject possibly, that the subject can recover it from the Crown by petition.

The Baron de Bode's Case.

The first time in which an attempt of this sort was made was in the year 1845, in the Baron de Bode's case (*y*), from the judgment of which we have previously cited a passage.

There the petition was for money received by the Crown to the use of the suppliant.

The facts were shortly as follows: The suppliant was a British subject whose property had been, after a decree of a French Court, confiscated by the French Government.

By the Treaty of Paris the French Government bound themselves to make compensation to a certain class of

(*x*) L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 29 W. R. 14.
(*y*) 8 Q. B. 208; 10 Jur. 773.

British subjects who had suffered loss by undue confiscation, and they paid money to certain commissioners in England to satisfy these claims. After payment of them there remained a balance of about £200,000, which was paid into the Government account at the Bank of England.

The suppliant, who had received nothing, and who claimed to be within the class of British subjects entitled to compensation, and being unpaid, claimed the value of his property confiscated.

The Court, after intimating in the before-quoted passage that a petition might lie for the recovery of money, decided against him upon the ground that no money had been received by the Queen for the suppliant's use, and gave no further decision upon the point whether or not if it had a petition to recover it would have been successful.

Frith v. *Reg.*

The next attempt in the same direction was in the year 1872 (*z*), when the suppliant, as legal personal representative of his grandfather, sought to have restored to him three several sums of money which had become due to his grandfather from the Sovereign of Oude, before the annexation of that province in 1856 to the territories of the East India Company. The Crown, however, took the preliminary objection that the suppliant should have proceeded in India and not England, and the Court upholding it the petition was not considered on the merits.

Rustomjee v. *Reg.*

This was followed four years later (1876) by the case of *Rustomjee* v. *The Queen* (*a*). The facts of this case seem to have been as follows: The suppliant was a merchant at Hong Kong, who, when war broke out between England and China in 1838–39, had a claim of a large amount against a Chinese

(*z*) *Frith* v. *The Queen*, L. R. 7 Ex. 365; 41 L. J. Ex. 171; 26 L. T. 774; 21 W. R. 19.

(*a*) *Rustomjee* v. *Reg.*, L. R. 1 Q. B. D. 487; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428.

merchant, which claim was then under investigation by a society of Chinese merchants, called the Cohong, of which the debtor was a member, and which was, by Chinese law, responsible for the payment of the debt to the creditor.

Upon the suppliant leaving Hong Kong he forwarded particulars of his claim to H. M. Superintendent of the trade of British merchants, who promised that Her Majesty would compel the Chinese Government to pay the same when terms were arranged between the two Governments; "and upon a subsequent occasion, when negotiations for a treaty were pending between the two Governments, H. M. Superintendent again promised" that the claims should be insisted upon against the Chinese Government, and that the amount should be paid to them when received from the Chinese Government.

On the 26th of August, 1842, a treaty of peace was signed between the Queen and the Emperor of China, whereby the latter agreed to pay to Her Majesty the sum of 3,000,000 dollars as and for the amount of debts due to British subjects, of whom the suppliant was one. And the said sum was paid to the plenipotentiary of the Queen for the purpose of paying the said suppliant and others.

The suppliant was not paid either in Canton or London.

The Crown demurred to the petition. The Court consisted of Cockburn, C.J., Blackburn and Lush, JJ.

In giving judgment Cockburn, C.J., said, "The effect of the above treaty is in my opinion simply this, that it places the fund at the disposition of Her Majesty for Her Majesty at her discretion to cause such distribution of it to be made as shall make good the claims which her subjects have against the foreigner from whose Government the money is received. In such a case a petition of right will not lie. The notion that the Sovereign received the money as agent or trustee is too wild to need observation—The distribution

must be left to Her Majesty's discretion; no petition of right has ever been held applicable to such a case."

Blackburn, J., in giving judgment, equally repudiated the notion that the Sovereign could be, under the circumstances, the agent of the subject; he then went on to show that all that the suppliant was entitled to on the facts was to have his claim investigated by the Crown, but that he had asked more, viz., that his claim be paid; then would a petition of right lie; upon which he said: "It is quite impossible to say that Her Majesty is in any sort of position of having received the money to the use of this person; and to say that there has been privity of contract between this person and the Queen, either an express or implied contract, so as to make her the agent to hold the money for him as if she had been a subject. According to *Williams* v. *Everett*, it seems to be out of the question. There is nothing in the least approaching to such a contract."

He then goes on to show that though it would have been more plausible yet it would have been equally erroneous to call the Queen a trustee for the subject, and attempt to recover by those means; as it has been held that a trust was not enforceable in any way against the Crown.

Lush, J., said that whether the claim be treated as a demand of a debt due from the Crown to the suppliant for money had and received by the Crown to his use, or whether it be treated as the claim of a *cestui que* trust to charge the Queen as trustee with receiving the money, he entertained not the slightest doubt that it must fail. In the first place, in receiving the money the Queen was not the agent, actual or constructive, of any subject whatever; neither was she trustee. "No doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China; but then the distribution when made would be not the act of an agent

accounting to a principal but the act of a Sovereign in dispensing justice to her subjects. For any omission of that duty the Sovereign cannot be held responsible. The responsibility would rest with the advisers of the Crown; and they are responsible to Parliament and to Parliament alone. In no view whatever can an individual subject have any such claim as the suppliant pretends to have by this petition, viz., a claim to coerce the Sovereign by judicial proceedings into the payment over of a part of the indemnity received in her sovereign character from the Emperor of China.

This case was taken to the Court of Appeal (*b*), where Lord Coleridge, C.J., delivered the unanimous decision of the Court, consisting of himself, Lord Justice Mellish, Sir Baliol Brett, and Sir Richard Amphlett. After pointing out that the Queen had not received the money "for the purpose of paying the suppliant's claim" as he alleged in his petition, but a lump sum divisible amongst all claimants, the Court went on to say that although they did not mean to decide that the Crown could never be an agent or a trustee, it was sufficient for them to say that in the case before them the Crown certainly was not, and continued as follows: "We do not indeed doubt that on the payment of the money by the Emperor of China there was a duty on the part of the English Sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to do justice to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal or of a trustee to a *cestui que* trust. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which Parliament can and will correct, not one with which the Courts of Law can deal."

More recently there has been another attempt in the

(*b*) L. R. 2 Q. B. D. 69; 46 L. J. Q. B. 258; 36 L. T. 190; 25 W. R. 333.

same direction: this is the case of *In re the Banda and Kirwee Booty, Kinloch* v. *The Queeen and the Secretary of State for India in Council* (*c*).

Kinloch v. Reg.

The facts in this case seem to have been as follows:—

The suppliant was an army chaplain, attached to Sir George Whitlock's column, which in the Rebellion of 1857 captured the booty in question; various claims having arisen to this booty, her Majesty by an order in council, dated June 1864, referred the question of their validity to the Court of Admiralty, by a judgment of which, delivered June 1866, the whole was awarded to General Whitlock and his forces subject to a claim of Lord Clyde's.

By royal warrant of the 22nd November, 1866, Her Majesty granted to the Secretary of State for India in Council the captured property, "in trust" to distribute the same amongst the persons who in the judgment of the Court of Admiralty were then entitled to share. The suppliant having failed in an action against the Secretary of State for India in Council for an account of such sums as had been already distributed and a distribution of the residue, now brought his petition of right praying that the Secretary of State for India in Council might be directed to render accounts of the booty, and that the rights of the persons entitled to share in it might be determined. To this petition the Crown demurred (*cc*), which demurrer being sustained before Mr. Justice Kay, the suppliant proceeded to the Court of Appeal.

The Court dismissed the appeal. In giving judgment, Lord Justice Cotton, after stating the facts, said that in

(*c*) The reports of this case will be found as follows: before Mr. Justice Kay, *Times*, 1882, Nov. 22; before Court of Appeal, W. N. 1884, p. 80, and *Times*, 1884, March 22.

(*cc*) On the ground that the petition was bad in law from not disclosing any cause of action on which the suppliant was entitled to sue or any right to any of the relief sought.

order to succeed, the suppliant must shew (1), either that the Crown had property of his in its hands or the hands of its agents, or (2), that there was a contract which entitled him to relief. The second alternative was out of the question in the present case, and the only question was whether the suppliant had established that he had property of which the Crown or its agents were in possession. On the two orders in Council and the judgment the suppliant claimed an interest in the nature of property; but even though the judgment of the Court of Admiralty assumed that a "grant" by the Crown had been made to the suppliant by the order in council of 1864, yet from the recitals and the operative part of the order it was clear that no grant had been made; the whole order proceeding not on the footing that Her Majesty was thereby granting anything, but that a grant should hereafter be made to those whom the Court of Admiralty should decide had captured it; no property had then thereby passed. Then no grant having been made, the property still remained in the Sovereign, and so could not be recovered by petition of right, no property of the suppliant's being in the hands of the Sovereign.

Lord Justice Bowen was of the same opinion: he said that the foundation of the claim was a right against the Crown. The appellant must make out that there was some property, real or personal, belonging to him, either at law or in equity, which was in the hands of the Crown, its servants or agents. He based his claim on the documents to which he referred, and which he said, either separately or collectively or in conjunction with the Army Prize Act, had vested in him some right of property; his lordship then came to the conclusion that no grant had been made by the Crown giving him any property in the booty, and that his appeal must therefore fail.

II.—Of the taking and detaining by the Crown.

Seizure must be wrongful.

Having concluded the first part of the subject which deals with the species of property which may be recovered by a petition of right, we have now to consider the second, which is the kind of taking and detaining which entitles the subject to a suit by petition of right.

We need hardly say that where the taking and detention are lawful, no petition will lie. There are, however, two other possible alternatives, the taking and detaining, that is to say, may be either *ab initio* wrongful, or under a title which is good until shewn, as it can be, to be bad. The Crown may, that is to say, in the words of an old judge, be seized "a tort ou a droit" (*d*); this latter expression perhaps needs some explanation. Suppose, for the sake of illustration, it is found by inquest of office that A. died seised of certain lands, intestate and without heirs, and the Crown thereupon entered and became seised of the lands in question, such entry and seizure would be lawful ("a droit"), but should the finding be proved to be erroneous, then the possession of the Crown becomes wrongful; and this would be the same were goods and chattels and not land in question.

Having thus explained the meaning of the foregoing phrase, we have now to see whether the remedy by petition of right is applicable to both cases.

Let us first take the case of the seizure being "a tort," or wrongful. Now so long as the property which has been wrongfully seized is detained in the immediate possession of the Crown, there seems little doubt that petition is the proper and only means of recovering it, and upon this point we may take Staunford's opinion as conclusive, when he says (*e*), "where the king doth enter upon me, having no

(*d*) Per Wilby, J. Y. B. 24 Ed. 3, 55.
(*e*) Prerog. Chap. xxii. p. 74 b.

title, and puts me out and detains the possession from me, I have then no remedy but only by petition."

Remedy for detention by patentee of Crown.

It may be, however, that after the wrongful seizure the Crown grants the land over by letters patent to another; in such a case there seems to be no necessity for the party grieved to bring his petition against the Crown, since he can recover possession of the land from the king's patentee as a trespasser by the appropriate common law remedy; "and the reason of this is because that when his highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is mine assize revived, for now the patentee entereth by his own wrong and intrusion and not by any title that the king giveth him, for the king had never title ne possession to give in that case. And this appeareth in M. 4, Ed. IV., f. 21 & 25, and M. 24, Ed. III., f. 64, and Travers 34 & 35. Like law is it if I have a rent-charge out of certain land, and the tenant of the land enfeoffeth the king by deed enrolled; now during the king's possession I must sue by peticion, but if his highness enfeoffe a stranger I may distrain for my rent upon a stranger; and so it is in the cases before, where a man may have his 'traverse' or 'monstrans de droit:' if the lands be once out of the king's hands the party then may have his remedy that the common law giveth him, for in all these cases a peticion did lye only for the dignity of his person and not for the right that he had to the possession of the thing" (*f*).

The reported cases seem to be in accordance with this opinion (*g*), and extend the law to cases where the title of

(*f*) Staunford's Prerog. Chap. xxii., fol. 74 b, 75 a.

(*g*) Y. B. 8 Hen. 4, 21; Bro. Abr. tit. Pet. 8; Y. B. 9 Hen. 4, 4; Bro. Abr. tit. Pet. 9; Y. B. 7 Hen. 4, 33; Bro. Abr. tit. Pet. 7

the king is by conveyance as if a disseisor conveyed the land to the king (*h*).

Seizure under colour of right by office found.

The second alternative is where the Crown is seised under a title which is good until shewn to be bad. Now the most usual cases of this sort were those in which the Crown came into possession of lands by the erroneous finding of an office, and in view of such an occurrence (*i*) it may be well to consider whether in such cases a petition of right is sustainable, or whether there is any peculiar and appropriate remedy.

It must be admitted that the two remedies which have hitherto been considered appropriate are "monstrans de droit" and "traverse of office." Without entering into the origin of these two methods of proceeding, it will be sufficient to say that they were given, at least in the wider forms in which they are now known, by statute (*k*) for the relief of persons dispossessed by offices; what we have now to see is whether they exclude or exist side by side with petition of right.

Whether petition can be sued where monstrans available.

That originally these remedies by "traverse" and "monstrans;" were given to the subject in order to enable him to avoid the expensive and dilatory method, as it then was, of petition, cannot be denied. Coke (*l*) himself says as much. There seems, however, no authority for saying that they were more than alternatives to petition of right; of which the subject might, and for the reasons above stated, usually did, gladly avail himself, but that they did not exclude the ulterior remedy by petition. Thus we have a dictum (*m*) of the

(*h*) Saddler's Case, 4 Coke, 59 b.

(*i*) Offices are apparently still held, Stephen's Blackstone (8th ed.), vol. iii. p. 666; and regulated by 12 & 13 Vict. c. 109, s. 20.

(*k*) 34 Edw. 3, c. 14, and 36 Edw. 3, c. 13.

(*l*) Saddler's Case, 4 Rep. 57, where a very full and interesting account of the origin and nature of these remedies will be found.

(*m*) Bro. Abr. tit. Traverse d'office, 18. In case ou home poet traverse un office il poet suer per peticion quod non negatur (per Spilman).

time of Edw. IV., not so very long after these remedies had been introduced, to the effect that in every case in which "traverse" or "monstrans" lies there petition lies too; and although Staunford does not express any opinion upon this point, subsequent text-writers have certainly spoken in a sense consistent with the above dictum: Manning saying (*n*) "that in all cases in which an office may be traversed, petition lies;" and Chitty (*o*), that "although not so appropriate, it is sustainable."

It would seem, therefore, in cases where the taking is under colour of right, by the finding of an office a petition of right is sustainable.

There is, however, another fact which should be noticed in connection with this branch of the subject. We have seen that where the king's wrongful title is by matter "in pais," if he grant over his interest, the party grieved is not put to his petition, but can recover at common law against the patentee (*p*); this does not seem to be the case "when the king's title accrues to him by a judicial record, or as Gascoigne (9 H. 4) says by judgment of record; there although the king grants all his estate over, yet the party grieved was put to his petition, and should have 'scire facias' against the patentee, as in case of attainder recovery, etc." (*q*).

(*n*) Excheq. Prac., 2nd ed. p. 121.
(*o*) Prerog. p. 341.
(*p*) *Supra*, p. 71.
(*q*) Saddler's Case, 4 Coke, 59 b.

CHAPTER X.

PETITIONS OF RIGHT FOR DAMAGES FOR BREACH OF CONTRACT.

Petitions for damages.

IN this chapter we propose to discuss the cases in which it has been decided that petitions of right will lie for the recovery of damages for breach of contract.

As this principle seems now to be well established (*c*), it may appear to be superfluous to criticise either it or the grounds upon which it rests; the general interest of the question, and the greatness of the interests it affects, may, however, afford some excuse for so doing, to say nothing of the possibility of the decision upon which it is based being hereafter reviewed.

As the whole question was fully discussed in the very recent case in which the foregoing principle was laid down, it appears to be a convenient method of treating the subject to set out the decision therein, and then to shew the grounds upon which it proceeded; and this is the course which will be adopted; a few words, however, are necessary by way of preface.

The state of the law previous to *Thomas* v. *Reg.*

It should be borne in mind that at the time when the question of the Crown's liability for breach of contract came before the Court it was practically a new one. Proceedings upon petition of right, which, so long as they had continued

(*c*) *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; 44 L. J. Q. B. 9; 31 L. T. 439; 23 W. R. 176; *Windsor and Annapolis Railway Company* v. *The Queen and the Western Counties Railway Company*, L. R. 11 App. Cas. 607; 55 L. J. P. C. 41.

in use had been confined to the recovery of specific property, after lying dead for about two hundred years, had been revived but a few years previously, and very little was known about the subject. To this feeling of uncertainty is probably due the alacrity with which every one concerned in a petition of right used to concur in turning it, when possible, into an ordinary suit (*d*). Upon the question of the Crown's liability in contract there was no authority whatever. It is true that Buller, J., in the year 1786 had, while presiding at *nisi prius* (*e*), uttered a dictum about petitions of right for breaches of contract, which had been echoed in Oldham's (*f*) and the Baron de Bode's Cases (*g*), and received a sort of sanction from what had taken place upon Frantzius' (*h*) and Churchward's (*i*) petitions; and it is also true that in two (*k*) cases brought under the Petitions of Right Act, 1860, the Court had, in giving judgments therein, that petitions would not lie for torts, spoken of petitions in contract in terms which were capable of conveying the impression that such petitions if sued would be successful; but still, notwithstanding these expressions of opinion, there was nothing which could be looked upon in the light of direct authority, and the Court had to examine for itself the original grounds of this method of proceeding.

(*d*) *Taylor* v. *Att.-Gen.*, 8 Sim. 413; *Clayton* v. *Att.-Gen.*, 1 C. P. Cooper's Reports in Chancery, 97.

(*e*) *Macbeth* v. *Haldimund*, 1 T. R. 178, *infra*, p. 67.

(*f*) 6 Sim. 220.

(*g*) 8 Q. B. 274; 10 Jur. 773.

(*h*) 2 D. & J. 126; 27 L. J. Ch. 368. This case was in contract, but compromised by payment to the suppliant.

(*i*) L. R. 1 Q. B. 173; 13 L. T. 57; 6 B. & S. 808. This case was in contract, and decided on the merits against the suppliant, but the Court (at p. 186), clearly intimated that they were of opinion that a petition of right would lie in contract.

(*k*) *Tobin* v. *Reg.* 16 C. B. (N. S.) 310; 33 L. J. C. P. 199; 10 L. T. 762; 12 W. R. 838; 10 Jur. (N.S.) 1029; *Feather* v. *Reg.* 6 B. & S. 294; 35 L. J. Q. B. 200; 12 L. T. 114.

Thomas v. *Reg.* stated.

After this short preface, which was necessary to enable the reader to understand how it was that the Court had in the case of *Thomas* v. *The Queen* to go so far afield for authorities, the decision in that case will be examined.

In this case unliquidated damages for breach by the Crown of a contract entered into between the suppliant and the Crown were claimed; the suppliant's case was succinctly stated in his petition, which was as follows:—

The petition.

1. That previously to the year 1859 the suppliant had devised and invented a system of heavy rifled artillery, and desired that the same should be introduced into and adopted by the public departments of Her Majesty's service; and that the suppliant having subsequently had various interviews and correspondence upon the subject with the then Secretary of State for War, it was mutually agreed by and between the suppliant and the Secretary of State for War that in consideration of the suppliant referring such invention to the ordnance select committee at Woolwich, and of such committee receiving from the suppliant such descriptions and drawings or models as might be necessary for their elucidation, to be retained for future reference and to enable the committee to give an opinion on the subject, and of the suppliant attending the committee in order to give his personal explanation, that in the event of the invention being approved of and being adopted in Her Majesty's service a reward in that behalf should be given by Her Majesty's Government to the suppliant, and that the amount of the reward should be determined by Her Majesty's master-general and board of ordnance. Averment that all conditions precedent have been fulfilled, yet the amount of the reward had not been determined, nor had the same or any part thereof been paid to the suppliant.

2. That the suppliant having invented certain artillery

constructed upon a new principle, and having in his possession certain plans and drawings explaining the same, and having incurred heavy costs, charges, and expenses in perfecting the invention, in consideration of the suppliant showing and delivering up his plans to Her Majesty's Government, Her Majesty's Government promised the suppliant that in the event of certain trials then about to be made of the artillery showing a successful result as far as the principle was concerned, the expenses to which the suppliant had been put should be reimbursed to him by the Government. Averment that all conditions precedent had been fulfilled, yet Her Majesty's Government had not reimbursed the sum to the suppliant.

The demurrer.

The Crown demurred to this petition on the ground "That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for breach of contract nor to recover money claimed either by way of debt or damages."

The judgment.

The argument upon the demurrer is not reported, but the judgment of the Court (Blackburn, Quain and Archibald, JJ.) overruling the demurrer was briefly as follows. After pointing out that the form of judgment provided by Bovill's Act would be applicable to a case in which it appeared to the Court that the plaintiff was entitled to be paid damages for the non-fulfilment of a contract, and alluding to the "general impression that existed at the time of the passing of the Act that a petition of right was maintainable for debt due or a breach of contract by the Crown," the Court proceeded to examine the grounds upon which this general impression was founded. In the first place the Court admitted that there was no statute giving any such right, which if it existed at all must exist at common law, the investigation of which could only be approached with diffidence on account of the danger of mis-

Reasons in favour of the petition.

interpreting the antiquated authorities to which recourse must be had.

Reasons against (1) the absence of precedent, (2) the inferences therefrom.

The argument against the petition of right lying in such a case it thought was entirely grounded on the absence of ancient precedents of petition for damages arising from a breach of contract and from the inferences deducible therefrom. These inferences were, first—that in the early times, when the remedy was formed, it was confined to cases in which a freehold interest was concerned, that being then the only interest of sufficient consequence to lead to the passing of a remedy; secondly—that from respect to the king the remedy was confined to cases in which redress could be granted by an order to the king's officers to withdraw; and did not extend to cases in which, unless the king chose to pay, there could be no effectual relief unless the king's treasure or lands and chattels were taken in execution; and that it could not be supposed that a judgment would be given which could not be enforced.

These inferences rebutted.

Against these inferences, however, the Court said, there should be set these two facts. First, that the last inference was not warranted, because in a certain class of cases it appeared that a petition of right lay where judgment could not have amounted to more than a declaration of the title to redress, leaving it to the Crown to give that redress afterwards. For instance where, as in the case of the *Earl of Warwick* v. *Duchess Dowager of Clarence* (*l*), the Crown had granted lands with a warranty: there, if the grantee was sued and prayed "aide le roy," and a writ of *procedendo* was thereupon awarded enabling the suit to proceed; then if the grantee could make no defence against the demandant, he lost the land, but had the same recompense *in value* against the Crown which he would have against his vouchee if a subject; and for such recompense in value a petition of

(*l*) Year Book, 9 H. 6. Pasch. pl. 7, folio 3.

right lay. On such a petition the judgment could not, the Court said, have been an "*amoveas manus*, but must have been either a dry judgment that the suppliant had a right to recompense in value, or one giving an execution against the land of the king."

Secondly, and in answer to the first inference, it was clear by authority that a petition lay for chattels as well as freeholds; and, if the petitions on the Rolls of Parliament were petitions of right, for damages as well.

Whether these Parliamentary petitions were or were not petitions of right the Court declined to say, nor did it think it necessary to do so, for in the opinion of the Court the reasons given by Lord Holt in the Bankers' Case (*k*) in favour of the judgment, which was ultimately adopted by the House of Lords, as well as the reasons given by Lord Somers for reversing it, both led to the conclusion that a petition of right lay in such a case as the present; and the Court added that as its judgment "mainly proceeded on the authority of that case, they would state it at length." The Bankers' Case.

"Charles II. had by letters patent under the great seal granted to the bankers who had been deprived of their money by the shutting of the Exchequer, and to their creditors, annuities in fee at the rate of 6 per cent. on the moneys thus detained. These annuities were charged on the hereditary revenue of the excise. No pains had been spared to make the letters patent as binding as possible. They contained, *inter alia*, a covenant from the king for himself, his heirs and successors, under the great seal, that due payment should be made, and that if there was any defect in these letters patent the king, his heirs and successors, would make a further grant; and the treasurers, &c., were commanded to give to the patentees tallies, and to pay them. The annuities were paid for four years, and then the

(*k*) 14 Howell, St. Trials, 1.

further payment ceased. During the reigns of Charles II. and James II. the bankers took no steps at law to enforce their claims, but in the first year of William and Mary (1689) they commenced proceedings, which were as follows. In Wroth's Case (*l*) they found a precedent in which, upon a petition to the Barons of the Exchequer praying that letters patent creating an annuity by the Crown should be enrolled, and execution in the shape of a writ commanding the treasurers and chamberlains of the Exchequer to pay the annuity and its arrears had been successful, and this precedent the patentees in the Bankers' Case followed. The Attorney-General demurred to their petition. They were successful, however, in getting judgment in the Court of Exchequer, and in having that judgment ultimately supported in the House of Lords, after it had been reversed upon error being brought in the Exchequer Chamber, where Lord Somers delivered his celebrated argument in the case in support of the reversal."

The judgments thereon.

Having concluded this summary of the facts of the case, the Court next dealt with the judgments delivered therein, viz., Treby's, C.J., Holt's, C.J., and Lord Somers's, in so far as they bore upon the question whether the patentees had a remedy by petition of right. Upon neither Treby's nor Holt's, however, was much stress laid, except to this extent: that the Court was careful to point out that the latter "certainly does not indicate that in his opinion there was not, in the case of a Crown debt, even the imperfect remedy of a petition of right;" and that he also maintains that "where there is a legal right against the Crown, there must be a legal remedy."

Lord Somers' judgment.

The Court then proceeded to deal with Lord Somers' opinion, the passage in his argument upon which they relied, as supporting the contention that a petition of right would

(*l*) Plowden, 452.

lie for damages for breach of contract, being as follows: "Indeed I take it to be generally true that in all cases where the subject is in the nature of a plaintiff to recover anything from the king, his only remedy at common law is to sue by petition to the person of the king. And to shew that this is so, I would take notice of several instances. That in the case of debts owing by the Crown the subject's remedy was by petition, appears by Aynesham's Case (*m*). which is a petition for £19 due for work done at Carnarvon;" upon which they remarked that: "Whether Lord Somers was right or not in thinking that the entries in Ryley are petitions of right, there can be no question that *he here expresses a distinct and considered judgment that a petition of right would lie against the Crown for a simple contract debt, such as wages.* And, unless we overrule this judgment of his, which is not opposed to Holt's reasoning, and cannot therefore be considered as necessarily overruled by the House of Lords, we must in this case give judgment for the suppliant, and we do not find that this opinion of Lord Somers has been questioned since, but rather the contrary."

Dicta of text-writers and judges.

The concluding portion of the judgment was as follows: "In Comyns' Digest, D. 78, it is said that petition lies if the king does not pay a debt, wages, &c., citing Lord Somers' argument 85; and Chief Baron Comyns expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth* v. *Haldimund* (*n*) that Lords Thurlow and Buller, J. (both *obiter*, it is true), expressed an opinion that a petition of right lay against the Crown on a contract, and a similar opinion seems to have been expressed by the Barons of the Exchequer in *Oldham* v. *Lords of the Treasury* (*o*), and in Baron de Bode's Case (*p*), in which the point

(*m*) 1 Rot. Parl. 164 b; Ryley, 251.
(*n*) 1 T. R. at p. 178.
(*o*) 6 Sim. 220.
(*p*) 8 Q. B. 274; 10 Jur. 773.

was raised though not decided. Lord Denman declares 'an unconquerable repugnance to the suggestion that the door ought to be closed against all redress and remedy;' a doctrine much resembling what Lord Somers calls Lord Holt's 'popular opinion' that if there be a right there must be a remedy. In *Viscount Canterbury* v. *Attorney-General* (*q*), it was decided that the sovereign could not be sued by petition of right for negligence, and in *Tobin* v. *Reg.* (*r*), that the sovereign could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract, Erle, C.J., expressly saying (*s*), that 'claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;' and in *Feather* v. *Reg.* (*t*), it is assumed in the judgment that it does lie 'where the claim arises out of a contract, as for goods supplied to the Crown on the public service.'

"We think, therefore, that we are bound by the Bankers' Case to hold that the judgment on this demurrer should be for the suppliant."

Such was the judgment in *Thomas* v. *The Queen*, establishing the principle that petition of right lies for damages for breach of contract.

The judgment examined.

The grounds upon which the Court seems to have based its judgment are as follows: (1) The authorities shewing that petition of right was not confined to cases in which a judgment of "amoveas manus" could be awarded; (2) The authorities shewing that it lay for chattels; (3) Lord Somers' "distinct and considered judgment" that it would lie for a simple contract debt as confirmed by the dicta of

(*q*) 1 Phill. 306; 12 L. J. (Ch.) 281; 7 Jur. 224.

(*r*) 16 C. B. (N.S.) 310; 33 L. J. (C.P.) 199; 10 L. T. 762; 12 W. R. 838; 10 Jur. (N.S.) 1029.

(*s*) 16 C. B. (N.S.) at p. 355; 33 L. J. (C.P.) at p. 206.

(*t*) 6 B. & S. 294; 35 L. J. (Q.B.) 200; 12 L. T. 114.

subsequent judges. Each of these grounds will be considered in turn.

Was the judgment on a petition for value an *amoveas manus?*

The authorities shewing that a petition of right was not confined to cases in which a judgment of "amoveas manus" could be awarded are, in the opinion of the Court, those in which a grantee from the Crown with a warranty recovered by petition in value against the Crown when ousted by a third party. "On such a petition," the Court said, "the judgment could not have been an "amoveas manus," but must have been either a dry judgment that the suppliant had a right to recompense in value, or one giving an execution against the land of the king."

The question is whether this statement is correct?

No authority is cited for this proposition, the decision in the case quoted (*Earl of Warwick* v. *Duchess Dowager of Clarence*) being, as the Court admitted, something different. Other sources of information have to be sought in order to test its probability.

Coke's definition of a warranty is as follows: "A warrantie is a covenant real annexed to lands or tenements whereby a man and his heirs are bound to warrant the same, and either upon voucher or by judgment in a writ of *warrantiæ cartæ* to yield *other lands and tenements* (which in the old books is called 'in excambio') *to the value* of those that shall be evicted by a former title" (*u*).

The course of proceeding upon a warranty between subject and subject was shortly as follows: When the grantee was sued and vouched his warrantor to warranty, the warrantor or vouchee was summoned by a writ addressed to the sheriff (*x*). If the vouchee made default after summons,

(*u*) Coke upon Littleton, L. 3, c. 13, s. 697.

(*x*) "Summoneas per bonos summonitores A quod sit coram justiciariis nostris & tali die ad warrantizandum B tantum terræ cum pertinentiis in tali villa quam E in eadem curia coram iisdem justiciariis & clamat ut jus suum versus praedictum B et unde idem B in eadem curia nostra

then a writ of "capias ad valentiam" issued to take *as much land* of the warrantor as was equal to the value of the land in question: and if he continued in default then judgment was given that the demandant should recover the land against the tenant, and the tenant an "excambium ad valentiam" out of the *land* of the warrantor. Upon this, there issued a writ (*y*) for the demandant commanding the sheriff "quod habere facias seisinam," and another for the tenant "de excambio" against the warrantor, the judgment being "Recuperat terram suam versus B per defaultam B et B in miseracordia et habeat *de terra ipsius C in loco competenti* excambium ad valentiam" (*z*).

If the warrantor appeared, and after trial judgment was given against him, the judgment was in effect the same.

Such was the procedure between subject and subject; it appears to have been very nearly the same where the Crown was concerned.

In the first place it is clear that the king was bound to warrant equally with a subject (*a*), but properly speaking he could not be "vouched," because "voucher" implied summons by writ, and the king of course could not summon himself. The grantee's course was to pray "aide le roy," the form of the prayer being "Sine rege respondere non potest eo quod habet chartam suam de donatione per quam si amitteret rex ei teneretur ad excambium" (*aa*). Now, "aid prier"

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corum iisdem justiciariis nostris vocat ipsum A ad warrantizandum versus prædictum E. etc., Reeve's "History of the English Law," 1 vol. 440; Bract. 383 b.

(*y*) The form of this writ was as follows:—Rex vicecomiti & tibi precipimus quod eidem A de prædicta terra cum pertinentiis sine dilatione plenariam seisinam habere facias et de terra ipsium C in balliva tua habere facias eidem B excambium ad valentiam prædictæ terroe sivie dilatione per visum legalium hominum. Teste, etc. Bracton, f. 387 a.

(*z*) Reeve, "History of the Common Law," 1 vol. p. 443.

(*a*) Bract. 382 b.

(*aa*) Reeve, "History of the English Law," vol. i., 439; Bract. 382 b.

was not a process originally applicable to cases of warranty, but only where "a man was impleaded and could not make defence without aid of some other" (*b*), whether the king or a common person, and hence an ambiguity arose, whenever "aide le roy" was sought, whether it was in the nature of a voucher or merely on account of feebleness of title, the entry of it upon the roll being the same in either case, or "all one" (*c*) as the reporter says. It was subsequently settled, in the very case quoted (*d*) in the judgment, that where it was in the nature of a voucher the special matter should be entered.

The above was the only difference in the proceedings where the Crown was concerned, and the "excambium" had to be rendered just as much in the one case as in the other.

The next thing which has to be considered is the nature and quality of the "excambium." It seems to have been lands and tenements, and nothing else. Coke in the foregoing passage defines it as "the other lands and tenements" yielded upon voucher, and the course of the proceedings points to the same conclusion. Under the "capias ad valentiam" the sheriff appears to have taken only lands; the judgment was for the value "in lands," and the writ of execution issued "for lands;" and this also is the view of the excambium taken by modern authorities (*e*).

If then the "excambium" was lands, what would be the proper judgment upon a petition seeking to recover it? That one, it would seem, which was usual in cases where land was recovered from the Crown by a subject. But in such cases the judgment was one of *amoveas manus*, and this is

(*b*) Com. Dig. tit. Aide Prier., B. (B. 1).

(*c*) Bro. Abr. tit., Aide le Roy, 3.

(*d*) Y. B. 9 Hen. 6, 3.

(*e*) Reeve's "History of the English Law," vol. i., p. 447; Roscoe's "Real Actions," vol. i., p. 273.

the very judgment which the Court says it "could not have been."

Of course if the "value" recovered had been given in the form of damages in money, then the Court would have been undoubtedly right.

Of the authorities which shew that petitions lie for chattels as well as freeholds, little need be said, for allowing that they do, the present argument is no way advanced: the question being, not of what quality of thing restitution can be obtained, but whether petition is available for other purposes than restitution.

The Bankers' Case explained.

Leaving these points, we turn to the consideration of the Bankers' Case, and Lord Somers' opinion therein.

Now, before entering upon an examination of this case it should be distinctly noticed that it is not one of petition of right at all, but a proceeding to obtain a debt due from the Crown, not by suing the Crown directly, but by petitioning the barons of the Exchequer; and that the true point of the case is not whether a petition *of right*, but whether a petition *to the barons* of the Exchequer would lie for such a purpose. It was ultimately decided that it would, though Treby, C.J., of the Common Pleas, and Lord Keeper Somers were of a contrary opinion.

This being the real decision, it may be fairly asked how it ever came to be looked upon as an authority for the proposition that a petition of right will lie for a breach of contract; this seems to have happened in the following way.

Lord Somers' argument and

Lord Keeper Somers, in the course of his argument against the granting of the remedy in the Court of Exchequer Chamber, maintained that as no warrant for payment was good unless passed under the Great or Privy Seal it could be no good petitioning the barons, who have no power to affix such seal; and to illustrate his argument he adduced

instances to shew that the course of business has always been for Crown debtors to petition the Crown, and for this purpose he lays the Rolls of Parliament under contribution. It is in this portion of his argument that he gives expression to certain statements about petitions of right in general. Some of these statements are certainly capable of the construction which has since been put upon them, and these are the ones which have been relied on as the authorities for the above proposition. That such statements are entitled to the greatest respect is certain; whether, however, it is justifiable to call them a distinct and considered judgment is questionable. Now, let us see what Lord Somers himself says upon this point, and, secondly, the grounds for his statement.

The passage will be found at p. 83, and is as follows; judgment.
he has just been arguing that the proper remedy for the recovery of the arrears of a freehold annuity is a petition to the person of the king (p. 82), and he goes on to add;—

"Indeed I take it to be generally true that in all cases where the subject is in the nature of a plaintiff to recover anything from the king, his only remedy at common law is to sue by *petition to the person of the king*. And to shew that this was so, I would take notice of several instances. That in cases of debts owing by the Crown, the subject's remedy was by petition appears in Aynesham's Case (Ryley, 251), which is a petition for £19 due for work done at Carnarvon Castle."

"So (Ryley, 251), the executors of John Estrateleng petition for £132 due to their testator for wages. The answer is remarkable: Habeant breve de liberate in canc' thes: et cameriis' de £32 in partem solutionis."

"So the case of Yerward le Galeys for £56: Ryley, 414."

"In like manner in the same book, 253, 33 Ed. I., several parties sue by petition for money and goods taken for the

king's use, and also for wages due to them, and for debts owing to them by the king. The answer is: "Rex ordinavit per consilium thesaurarii et baronum de scaccario quod satisfiet iis quam citius fieri poterit; ita quod contentos se tenebunt." And this is an answer given to a petition presented to the king in parliament, and therefore we have reason to conclude it to be warranted by law. They must be content, and they shall be paid "as soon as possible." The parties in these cases go first to the king by petition; it is by him they are sent to the Exchequer, and it is by a writ under the Great Seal that the Exchequer is empowered to act.

Let us now see how far the foregoing passage is an authority for the statement that a petition of right will lie against the Crown for a simple contract debt such as wages.

What Lord Somers meant.

In the first place, in order to understand Lord Somers' argument, it is not necessary that we should conclude that when he spoke as above of the subject's remedy being in such cases as he describes "*by petition to the person of the king*," that he necessarily meant that such a petition would be a petition of right; he may merely have meant to say that when you are a creditor of the Crown, to the Crown you must go for payment, as none but the Crown can give you a warrant for payment; you may or you may not be paid, but it is useless to go elsewhere.

That this was his meaning seems probable when we consider that all he was arguing for was, that you must go to the king and not to the barons, and that the point whether the king was or was not forced to pay was hardly before him; and that if he really did mean that the king was bound to pay he used very bad illustrations to his text, because out of the three instances he adduces it will be seen that the king only paid one of the petitioners, viz., Aynesham, and that, with regard to the other two, he paid the

second only about a sixth of his debt, and the third he only promised to pay "as soon as he could," which would hardly satisfy suppliants who were entitled to be paid in full.

If this is all that is meant, then his remarks are perfectly justifiable and his cases are apposite.

The Court's interpretation of Lord Somers' argument.

But the Court in Thomas' case gave Lord Somers credit for meaning more than this, and said that in speaking as above he expressed a "distinct and considered judgment, that a petition of right would lie against the Crown for a simple contract debt such as wages" (*f*).

Reasons against this interpretation.

No doubt this opinion receives some colour from the fact that he certainly does seem to have considered Aynesham's case, at all events, as a petition of right (*g*). But there are grounds for saying that if this was his judgment, and if he did consider such cases as Aynesham's to be petitions of right, as they have been understood from Staunford's time downwards, that he was in error.

To understand precisely what was done in Aynesham's case it is necessary to make a brief preliminary statement.

Aynesham's case examined.

It may be taken as true that at the time at which Aynesham presented his petition, no money could be paid out of the Exchequer without a writ for so doing (*h*). This writ, which was issued from the Chancery and passed under the Great or Privy Seal, was called a "Liberate," of which the following example is given by way of illustration.

"Henricus Dei Gratia Rex &c. (Roberto) Thesaurario et (Willelmo Malduit et Warino filio Girolde) Camerariis suis,

(*f*) *Per Curiam*, *Thomas* v. *The Queen*, L. R. 10 Q. B. at p. 43; 44 L. J. Q. B. at p. 16; 31 L. T. at p. 443; 23 W. R. at p. 179.

(*g*) See 14 Howell's State Trials, p. 61, where Lord Somers seems to consider the endorsement on Aynesham's petition, viz., "fiat breve' de canc' de liberate thesaurario et camerariis quod liberent ei tantam summam et onerent Hugonem Camerarium de Carnarvon," as a "special one,' for a "petition of right."

(*h*) 11 Coke's Reports, 91; Dialogus de Scaccario, 2 Mad. 373.

salutem. Liberate de thesauro meo XXV marcas fratribus Carlusiæ, de illis L marcas quas do iis annuatim per Cartam meam. Teste Willelmo de Sanctæ Mariæ Ecclesia apud Westmonasterium" (*i*).

In every case, therefore, in which a creditor of the Crown was paid it was by one of these "liberates;" the steps in the transaction seem to have been as follows. In order to obtain the writ the creditor approached the person of the Sovereign by petition, informing him by recital therein how and for what the debt was contracted, and praying for the king's warrant for the issue of the writ. If the king assented, he indorsed the petition in some such form as the following:—

"Fiat breve de Cancellaria de Liberate Thesaurario et Camerariis quod liberant ei tantam summam."

With the petition thus endorsed the suppliant went to the Chancery, where, upon the strength of the endorsement, a writ in the form above given was issued to him; this writ he took down to the Exchequer, where it was first copied upon a roll (*k*) which was kept there for recording all the "liberates" issued by the king, and then the suppliant received cash for it.

The transaction was very simple, and is very much as if the Sovereign were to pay his creditor by a cheque upon his bankers. That this was the usual course of business is stated by writers upon the Exchequer such as Coke and Maddox, and is plain by comparing the Rolls of Parliament where the petition for the "Liberate" was recorded with the "Liberate Roll" which records the issue of the "Liberate" itself.

To show the sort of payments that were made by "Libe-

(*i*) A number of specimens of this writ are collected, 1 Mad. 390.

(*k*) These rolls are still in existence and have been partially edited: "Rotuli de Liberate & Regnante Johanne, Cura Duffus Hardy, London, 1844"; and "Issues of the Exchequer," Frederick Devon, London, Murray, 1837.

rate," it will be well to extract a few cases from the Roll of 10 H. 3 (*l*).

The king by his writ in the form above given, commands the treasurer and chamberlains of his Exchequer to pay ("liberate") the following sums to the people and for the purposes following:

"To William, a monk of Beaulieu, going on our embassy beyond sea, for his expenses, 2 marks.

"To Peter, the engineer of war-slings, going to our castle at Corfe, to make our slings there, 4 marks.

"To Joan, the wife of Ralph de Georges, 4 marks to purchase a robe and a cope.

"To Robert Brimman and Roger Fegg, for the use of the men of Yarmouth, £30, for herrings purchased to distribute in alms.

"To Richard de Chilleham, 10 marks, as a loan.

"To Isabella, the wife of our beloved Clerk, Robert of Canterbury, 5 marks, to purchase a robe for our use."

Besides these there are many others to carpenters, masons, jewellers, upholsterers, for various works they had done, and some to monks for saying mass.

This form of payment lasted down to the reign of Wm. IV., the two last people who received money in this way being the Master of the Rolls, for whose benefit a writ of Liberate passed under the Great Seal as late as 1837, and the Usher of the Exchequer, who received payment in this way in 1844 (*m*).

Aynesham's case one of petition for a "liberate."

We are now in a position to understand what was done in Aynesham's case: here is the account of the matter extracted from the Rolls of Parliament by Ryley (*n*).

(*l*) Issues of the Exchequer, F. Devon, *supra*.

(*m*) Rotuli de Liberate cura Hardy, *supra*, introduction.

(*n*) "Placita Parliamentaria," 251.

"Ad petitionem Henrici de Aynesham Cementarii petentis quod Rex velit precipere quod solvatur de xix^{li}. v^{t}. q qui ei debentur de tempore quo operabatur in operibus Castri Regis de Carnarvon unde Thesaurarius habet Certificationem, &c.

"Ita responsum est:—Fiat breve de Cancellaria de Liberate Thesaurario et Camerariis quod liberant ei tantam summam, &c."

Shortly, that is to say, Aynesham petitioned the king for his "precept" for a writ of "Liberate," and was successful. A similar account may be given of Estrateleng's case, while it is sufficient to look at the entries of Yerward de Galeys' and the "general debtors'" cases in Ryley, to be satisfied that they were not petitions of right.

Now Lord Somers seems to suppose that not only the foregoing petition, but also all the petitions in Ryley's "Placita Parliamentaria" are petitions of right; and as he founds his opinion that petition of right lies for damages for breach of contract upon this supposition, it will be as well to see if he is correct.

Petitions for "liberates" not petitions of right.

As the question whether petitions for "liberates" can be considered as petitions of right has already been fully discussed, it is not proposed to recapitulate that argument: but upon the general question whether all the petitions in Parliament can be considered petitions of right, a few remarks may be offered.

Position of petitions in Parliament.

By the common law of England, every subject has, as we have seen, the right of petitioning the Sovereign for the redress of grievances. Such grievance may be either a complaint of a violation of some right by the Sovereign, in which case the subject will have not only the right to petition but, in a non-legal sense, a right to redress, and his petition will be what is called a petition of right; or his grievance may be merely in the nature of a complaint not giving him any title

to redress, but of which the king may of his grace take notice, and afford such alleviation as the circumstances of the case seem to require, and he is competent within the order of the law to give, but of which he is not bound to take any notice at all. There are other petitions upon the border-land between these two classes, in which it is impossible to say whether redress is due to a suppliant as a right or as a favour; and it is this distinction among petitions that Lord Coke probably had in his mind when he said "Of petitions in Parliament some be of right, some of grace, and some mixt of both" (*o*).

Petitions in Parliament not all petitions of right.

Now, if it could be positively affirmed with respect to all the petitions presented in Parliament that they belong to the first of these classes, in which redress is given as a matter of right, the difficulty of determining whether a petition lay in any particular case would be at an end; there are, however, certain difficulties in the way of those who (*oo*), like Lord Somers, take this view of them, which difficulties are as follows:

Reasons for so holding.

The first is this; unless we are prepared to say that there never were such things as "petitions of grace," and some "petitions mixt of both," as Lord Coke says, we must be at some loss to know where the records of such petitions are to be found; they were certainly presented in Parliament, and it is at least singular that no mention of them should appear upon the Rolls.

Again, if all the Parliamentary petitions are petitions of right, and are at the present day binding authorities upon the Courts, then why should any line at all be drawn as to what can or cannot be recovered by this method of proceeding, other than that which we find drawn in the answers by Parliament?—but when we come to examine them, we find

(*o*) 4 Inst. 11.

(*oo*) Serjeant Manning in *Smith* v. *Upton*, 6 M. & G. 251.

there is no such line. For instance, it is quite plain that a subject can recover in contract, as the following examples shew.

For bread and meat sold to late king—

6 Ed. 1; 1 Rot. Parl. 1 b.

Work done as a mason—

Aynesham's Case, 33 Ed. 1; 1 Rot. Parl. 164 b; Ryley, 251.

Wages and loss of horses—

Estrateleng's Case, 33 Ed. 1., ibid.

Price of wax—

Basyng's Executors, 35 Ed. 1; Ryley, 334.

Services in Gascony—

Fitzwalter's Case, 33 Ed. 1; Rot. Parl. 169 a; Ryley, 259.

Price of a horse—

Beisney's Case, 33 Ed. 1; 1 Rot. Parl. 164 b.; Ryley, 251.

Money paid—

Lodelawe's Case, 33 Ed. 1; 1 Rot. Parl. 169 b.

Wages—

John de la Dolyne's Case, 33 Ed. 1; Ryley, 245.

Arrears of pay—

14 Ed. 2; 1 Rot. Parl. 378 a; Ryley, 414; Yerward's Case.

Surcharge of rent—

14 Ed. 2; Ryley, 402; Cotingham's Case.

Price of oats—

Bissop's Case, 14 Ed. 2; Ryley, 408.

Rent of land seized by king—

Abbot of Faversham's Case, 4 Ed. 3; Ryley, 646; 14 Howell, 60.

Value of ship lost in king's service—

Adam le Clerk's Case, 8 Ed. 2. 1; Rot. Parl. 317 b.

Debts owed to suppliant's husband attainted by king—

15 & 16 Ed. 2.; 1 Rot. Parl. 415 b.

And also in *tort*, as the following cases shew:—

Disturbance in perception of tithes—

Prior of Chr. Ch. Case, 31 Ed. 1; 1 Rot. Parl. 59 b.; Ryley, 218.

Tithes subtracted by the king's officers—

8 Ed. 2, 1; Rot. Parl. 319 a.

Wrongful distress—

John Mowbray's Case, 33 Ed. 1; 1 Rot. Parl. 163 a; Ryley, 218.

For wool wrongfully taken for king's use—

Michael de Harcla's Case, 33 Ed. 1; 1 Rot. Parl. 163 a; Ryley, 248.

Wheat seized under pretence of a royal commission—

14 Ed. 2; 1 Rot. Parl. 320 a.

And lastly in cases where one would certainly have imagined that relief would have been a pure matter of favor; for instance, in one case (*p*) Caddell asks for a reward because he has lost his brother and cousin in the wars in Ireland, and the king certainly entertains the request. If this is law at the present day, why should not any one who has suffered from a *tort* by the servants of the Crown, or who lost a relative in war, recover upon a petition of right? It is hard to find any answer, and yet it has been absolutely decided by the Courts that in neither of the above cases (*q*) has the suppliant any claim.

Such doubts having arisen in reference to these parliamentary petitions, are there any reasons which might

(*p*) Ryley, P. P., p. 414. A nostre Seigñ le Roy prie pur Dieu Johan Cadel Direland, quad este sovent en sa guerre en Ireland & a la saut de Berewyk quil lui plese grauntier en reward de son service l'office desliere portier du Chastiel de Dyvelyn a terme de sa vie a tenir en reward del mischief que lui avient quant il perdit son frere et son cosyn per les Escotz en Ireland. Ita responsum est: Expectet adventum Justiciorum et Rex inde habebit eorum avismentum.

(*q*) *Tobin* v. *Reg.* 16 C. B. N. S. 310; 33 L. J. C. P. 199; *Feather* v. *Reg.* 6 B. & S. 294; 35 L. J. Q. B. 200.

induce us not to regard all of them as petitions of right?

It would seem that there are. In the first place, never before they were quoted by Lord Somers in the Bankers' Case were they mentioned in any judgment, abridgment, digest, or text-book as authorities: neither Fitzherbert, Broke, or Staunford mention them; and every definition which these writers attempt of petition of right is utterly inconsistent with the supposition that they regarded these parliamentary petitions as binding upon them. Coke, who may be said to have summed up in his notes to the Saddlers' Case the learning on the subject of petition, monstrans, and traverse, never even makes a passing allusion to them. Is it likely that such lawyers as these would be utterly ignorant of such a mine of precedent close at hand? that the memory and tradition of such things should have completely died out from the minds of the judges who sat upon the bench? and that they should solemnly have assembled, as they did in Henry the Seventh's reign, to decide whether a petition would lie for specific chattels or a term of years, when, if these parliamentary petitions are to be regarded as precedents, it had long ago been held that it would lie upon almost every imaginable claim?

If, then, Lord Somers' opinion that petition lay for damages for breach of contract was founded upon an erroneous supposition that the petitions in Parliament were petitions of right, it would seem open to revision at the present day.

Summary of the argument.

It may be admissible perhaps here to sum up the foregoing argument as follows: First, that as in the passage of Lord Somers' judgment which is relied upon, petition of right is not mentioned, but only "petition to the person of the king," it is possible that Lord Somers was not thinking of petition of right at all, but of the old system of petitioning

the king in Parliament for payment of a debt by "a writ of Liberate." Secondly, that this interpretation of his meaning is rendered probable by the following considerations: (1) that he was not arguing that the Crown *must* pay in cases of debt, but that it was the only person who *could* pay, there being no one else who could issue a warrant on the Treasury; (2) that Aynesham's case, by which he supports his argument, is not a petition of right but a petition for a "Liberate;" (3) that for the purposes of his argument a petition for a "Liberate" is just as good an illustration as a petition of right. Lastly, that if the words "petition to the person of the king" are interpreted to mean "petition of right," they involve Lord Somers in a misunderstanding of Aynesham's case, which is improbable, seeing that he had thoroughly mastered the subject of petitions of all sorts.

In conclusion, the statements of text-writers and the dicta of judges given by the Court in the case of *Thomas* v. *The Queen* in support of its decision have to be considered.

Explanation of Baron Comyn's opinion.

The Court said that Chief Baron Comyn (*r*) "expresses no doubt as to the soundness of the doctrine laid down by Lord Somers, and cited by him in his Digest." Upon this point it is well to remember that the work in question is a mere repository of decisions and dicta, and that doubts that are not to be found in reported cases are not given therein.

Turning to the dicta of judges, the first one is that of Buller, J., in *Macbeth* v. *Haldemund* (*s*).

Buller's dictum in *Macbeth* v. *Haldemund.*

The circumstances under which this opinion was expressed were as follows:—In the year 1786 an action was brought against a Government official for the price of certain goods which had been supplied at his order to one of the English

(*r*) See also Manning, Ex-practice, p. 84; Chitty's Prerog., p. 341, for similar opinions based on a similar ground.

(*s*) 1 Term Rep. 176.

forts in Canada. The defence was that the defendant had thereby incurred no personal liability, but that the goods had been supplied to and upon the credit of the Government. After the judge (Buller, J.) had summed up the case to the jury, they asked him whether any one else would be liable in the event of the present defendant being discharged; he informed them that this consideration was no part of their duty, but added that he was of opinion that if the plaintiff's demand were just, his proper remedy was by petition of right.

An opinion of this sort, uttered at *nisi prius*, can never, it is submitted, be received with too much caution, however eminent the judge may be who utters it; but the circumstances under which the one above was uttered, without apparently any previous consideration or argument of counsel, make it, it is submitted, of little value as an authority; and it is significant that when it was challenged upon the argument of the rule for a new trial, no effort was made by the Court to uphold it, the judgments not containing any mention of it; the only allusion to it being in Lord Mansfield's judgment in granting the rule, and he only says that Lord Somers' judgment in the Bankers' Case seems to go that length, which is quite true; while he himself expresses no opinion of his own whether Lord Somers in so deciding is right or wrong.

Lord Denman's *dictum* in the Baron de Bode's Case,

Neither in *Oldham* v. *The Lords of the Treasury* (*t*) nor in the *Baron de Bode's Case* (*u*), do there seem to be any observations which can be properly applied to petitions of right for damages for breach of contract. The former case only contains a dictum to the effect that money due to a subject by way of pension can be recovered by this means; and if the latter case be carefully read it will be

(*t*) 6 Sim. 220.
(*u*) 8 Q. B. 274.

seen that the "suggestion" to which Lord Denman felt such repugnance was not "that a petition of right would not lie for damages for breach of contract," but "that though it should lie for lands and chattels it would not lie for money," which appears to be a very different thing.

The case of *Viscount Canterbury* v. *Attorney-General* is really totally inapplicable, the question of petition of right for damages on contract not having been raised either in the argument or judgment.

With regard to the two remaining cases, the following account may suffice. In the year 1865 two attempts were made to extend the remedy by petition of right to cases of alleged *torts* by the Crown. One case was brought in the Court of Common Pleas, the other in the Court of Queen's Bench; and in neither was any decision upon the Crown's liability in cases of contract asked for. In both cases, however, the Court noticed the question.

The Court of Common Pleas, in giving judgment against the suppliant, said (*x*): "We pass the class of claims founded on contracts and grants with brief notice, because they are within a class legally distinct from wrongs. In the Bankers' Case Lord Somers so treats them, giving various instances of petitions for money on account of work, wages, debts, and goods founded on contract, and he makes no allusion to a claim against the king for damages for a wrong. We pass from the class of claims on contract in all systems of law distinguished from claims founded on wrongs," which latter cases we will now examine. and of the judgments in *Tobin* v. *Reg.*

The Court of Queen's Bench said: "We think that the only cases in which petition of right is open to the subject are where land or goods or money of the subject have found their way into the hands of the Crown, and where the purpose is to obtain restitution, or where that cannot be *Feather* v. *Reg.*

(*x*) *Tobin* v. *Reg.*, 16 C. B. N. S. at p. 355; 33 L. J. C. P. at p. 206.

obtained compensation in money, *or where the claim arises out of a contract for goods supplied to the Crown or the public service.* It is in such cases only that instances of petition of right are to be found in the books, and no case has been shewn in which it has been brought for a wrong" (*y*).

The Court in their judgment treat both these passages as intimations of opinion that the Crown is liable in contract; this, however, it is submitted, is not their necessary consequence; the former contains no expression of opinion whatever, either for or against such a proposition, while the latter only purposes to be an enumeration of those cases in which precedents for proceeding by petition of right could be adduced, and which is only given for the purpose of shewing that the case which the Court was then considering was not sustainable even if the very widest and most liberal definition of what could be the subject of a petition of right was adopted.

Such is the judgment in *Thomas* v. *The Queen*, which established the principle that the Crown is liable in damages for a breach of contract: a decision which can perhaps be better supported on the ground of expediency than precedent. Looking back at the foregoing pages, it seems as if the whole doctrine was founded on what, in the light of better information, appears to be a misapprehension of certain cases which it has been endeavoured to present in the preceding pages in their true light. This misapprehension, originating with Lord Somers, who was not only distinguished as a lawyer, but was also justly regarded as an authority upon the subject, from the time and money which he spent in mastering the learning thereon in connection with his celebrated judgment in the Bankers' Case, crept into most of the text-books published after that date, and is perhaps

(*y*) *Feather* v. *The Queen*, 12 L. T. 114; 6 B. & S. 257; 35 L. J. Q. B. 200.

to be held responsible for the dicta by various judges to a similar effect which are to be found scattered through the Reports. Such being the state of affairs in 1874, there was sufficient authority, for the Court of Queen's Bench, possibly impressed with the convenience of dealing in this manner with such claims as Mr. Thomas then pressed against the Crown, and to a certain extent perhaps influenced by a consideration of the hardship which would be inflicted upon suppliants by refusing them relief, found it possible to decide that a petition of right would lie to recover unliquidated damages for breach of contract from the Crown.

Cases subsequent to *Thomas* v. *Reg.*

Whatever doubt may exist as to the reasoning upon which the decision is based, it would be wrong to suppose that the decision itself has been received with anything like disfavour or hostile criticism in superior Courts; on the contrary, it has been accepted as law by the Court of Appeal and the Judicial Committee of the Privy Council.

Kinloch v. *Reg.*

Thus, in the case of *Kinloch* v. *The Queen* (*z*), the particulars of which we have already given, Lord Justice Cotton, in giving judgment, thus recognised the subject's remedy for a breach of contract by the Crown: "It would be right," he said, "to state, in the first place, what it was that Mr. Kinloch must shew in order to succeed. He must shew either that the Crown had property of his in its hands, or in the hands of its agents, *or that there was some contract which entitled him to relief.* And similarly, *De Dohsé* v. *The Queen* (*a*) and *Eyre* v. *The Queen* (*b*), which were both cases upon contracts, both came before the Court of Appeal without the subject's right of petitioning in contract being questioned.

De Dohsé v. *Reg.* *Eyre* v. *Reg.*

(*z*) *Times*, March 22, 1885.

(*a*) Divisional Court, *Times*, 3rd June, 1885; Appeal Court, *Times*, 3rd March, 1885; House of Lords, *Times*, Nov. 25, 1886.

(*b*) *Times*, June 8, 1886.

Reg. v. *Doutre.*

Two cases had recently come before the Privy Council on appeal from Canada in which it has been recognised. In the first, the suppliant, who was a member of the Quebec Bar, sought to recover from Her Majesty, upon a *quantum meruit* payment for services rendered upon a retainer by the Canadian Government, to represent them at a certain Fishery Commission, sitting at Halifax; the only point discussed was whether the suppliant's status as a barrister prevented him from suing for his fees, and it was tacitly admitted that if it did not, he could recover on such a contract between himself and the Crown (*c*).

In the second case (*d*) the question as to the liability of the Crown on contract was distinctly raised. The facts were as follows:—

Windsor, etc., Railway v. *Reg., &c.*

The Government of Canada, by an agreement dated the 22nd of September, 1871, undertook to give the Windsor and Annapolis Railway Company the exclusive use of the Windsor Branch Railway, and also running powers over the trunk line from Windsor Junction to Halifax for the term of twenty-one years. The abovementioned company in pursuance of that agreement entered upon and worked the Windsor Branch Railway until the 1st of August, 1877, when the Government Superintendent of Railways took possession of the line and put an end to the occupation of the company, subsequently leasing it to another company.

One of the questions for the decision of the Privy Council was, whether the Crown was liable for this breach of contract; upon this point the Judicial Committee said as follows:—

"Their Lordships are of opinion that it must now be re-

(*c*) *The Queen* v. *Doutre*, L. R. 9 App. Cas. 745.

(*d*) *Windsor and Annapolis Railway Company* v. *The Queen and the Western Counties Railway*, L. R. 11 App. Cas. 607; 55 L. J. P. C. 41.

garded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown."

"Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27, Dom. Parlt.) contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas* v. *The Queen* appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages in respect of the violation of contract is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin* v. *The Queen*, Chief Justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right for a wrong done by the executive, took care to explain that claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs."

"It was argued for the respondent that in *Thomas* v. *The Queen* the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract, and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this board to be quite as applicable to a claim of unliquidated damages for breach of contract as to a claim for the contract price. Lord Blackburn rests

the judgment mainly upon the Bankers' Case, which was a suit for annuities granted by letters patent under the Great Seal; but his Lordship at the same time points out that from the time of Lord Somers there had been repeated expressions of opinion by eminent judges in favour of a view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas* v. *The Queen*. Their Lordships may, however, refer to the accurate exposition of the law given by the late Cockburn, C.J., in *Feather* v. *The Queen*:—"We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin* v. *The Queen*. We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service."

Not only has the principle been approved, but it has also been very largely acted upon both at home and abroad.

Canadian cases.

Thus in Canada the following cases have been decided:—A contractor has been allowed to petition for the price of extra work under a contract (*e*); a barrister to proceed upon a *quantum meruit* for his fees (*f*); a Crown lessee of fly-fishing disturbed in his enjoyment thereof, on his covenant for quiet enjoyment (*g*); a contractor with the Govern-

(*e*) *O'Brien* v. *The Queen*, Canada S. C. R., vol. iv., p. 529 (1881); *Jones* v. *The Queen*, Canada S. C. R., vol. vii., p. 570 (1883); *Isbister* v. *The Queen*, Canada S. C. R., vol. vii., p. 696 (1884).

(*f*) *The Queen* v. *Doutre*, Canada S. C. R., vol. vi., p. 342 (1882).

(*g*) *The Queen* v. *Robinson*, Canada S. C. R., vol. vi., p. 52 (1882).

ment for the official printing for damages for a breach thereof (*h*).

And in England most of the claims between Government and the various contractors for public works are settled in this way, as the return "From the Lords Commissioners of Her Majesty's Treasury of every Petition of Right which up to the Date of the Return (*i*) has been Presented to and fiated by her Majesty under the Act 23 & 24 Vict. c. 34," shews.

A tort cannot be treated as a breach of contract.

But although the Crown is liable in contract, a subject cannot, it is submitted, treat a wrong so as to make the Crown liable: he cannot, that is to say, frame his *tort* as a breach of contract, and so recover.

A very ingenious attempt was made lately in America in this direction.

It should be first stated that claims against the Government in America are adjudicated upon by the Court of Claims, and that as the only claims which the Court can entertain are cases of contract, the position of a suppliant in America and England is very similar.

This being so, a suppliant, a private citizen, the owner of certain buildings which had been seized by a Government officer for the use of the Government under a claim that they belonged to the Government, sought to recover against the State for use and occupation. In support of this claim he used the following very ingenious argument: the maxim that the State can do no wrong is as true in America as the maxim that the king can do no wrong is in England; the action, therefore, of the Government officer cannot be a trespass; if it had been, undoubtedly the claimant could not recover.

But if it is proved that the Government are in possession

(*h*) *The Queen* v. *Maclean*, Canada S. C. R., vol. viii., p. 210 (1884).

(*i*) Ordered by the House of Commons to be printed 15th June, 1876.

of the land, and it is admitted that they are not there wrongfully, then they must be there rightfully. But the only way in which they can be there rightfully is with the owner's consent. This, therefore, must be implied in the present case. They are, therefore, liable for use and occupation.

The Court, however, held that the action of the Government officer was an unequivocal *tort*, and that the Government in consequence were not liable (*k*).

(*k*) *Langford* v. *United States*, 11 Otto, 341, cited also as 101 U. S. Repts. 341.

CHAPTER XI.

Petitions of Right in Equity.

Whether such petitions can be sued.

At the present time, and in the face of the numerous petitions of right claiming equitable relief against the Crown which have been presented and allowed to proceed in the Court of Chancery, it seems too late to say that there is no authority for making such claims enforceable, and yet with some little qualification such a statement would be substantially correct.

In the first place, there is no such authority to be found in either Broke's Abridgment, Staunford's Prerogative, Comyn's Digest, Manning's Exchequer Practice or Chitty's Prerogative: what authority there is, therefore, must be of comparatively modern growth.

Early application to the "Chancery" explained.

It is quite true that these last-mentioned authors recognize that a suppliant may sometimes obtain relief by process issuing from the Chancery, as ancillary to and in aid of his common law right, instead of following out the usual procedure upon petition of right; but they do not shew that a suppliant was ever entitled to equitable relief where he had no enforceable right at common law.

Thus, for example, the king having a rent-charge by wardship, grants it over in fee by letters patent to a stranger. Here the ward, when of age, will be entitled to bring his petition, or, if he prefers it, a *scire facias* from the Chancery to repeal the letters patent (*a*).

(*a*) Bro. Abr., tit. Pet. 11; Y. B., 21 Ed. 3, 47.

Again, the king recovers in *quare impedit* by default against one that was never summoned. Here, as in the former case, the injured party may either bring his petition generally, or he may ask for and obtain the issuing of a "writ of deceit" from the Chancery, upon the issue of which the formalities attendant upon a petition of right proper will be avoided, and the justices to whom the writ is directed may proceed to examine the "deceit" without more (*b*).

Now, although it cannot be denied that in a certain sense the foregoing cases are applications to the Chancery, yet it was not with a view of enforcing any equitable claim against the Crown, but only to ask its assistance to enable the suppliant to obtain more quickly that to which he had a good common law right by petition, and the Chancery in this connection does not mean the Court of Equity but the office out of which issued all original writs passing under the Great Seal; and it may be asserted that none of the above authorities afford any ground for supposing that equitable claims as such are enforceable against the Crown.

Why such petitions should not be sued.

And, indeed, upon consideration, this is no more than might have been expected, since where the Crown is concerned the Court would in most cases be powerless to enforce its decrees, and would therefore decline to make them. Equity principally, if not exclusively, acts *in personam* (*c*); its judgments, that is to say, are in the nature of commands or orders to the people against whom they are given to do or abstain from doing certain acts; and the means which it employs to enforce its judgments are by attachment of the person when the person is within the jurisdiction, and also by sequestration, so far as there are lands or goods of the

(*b*) Bro. Abr., tit. Pet. 34; Y. B. M. 10 H. 4, fol. 4. Staunford's Prerog., cap. xxii., fol. 73 a.

(*c*) *Penn* v. *Ld. Baltimore*, 1 Ves. 444; 2 W. & T. L. C. 837.

offender within the jurisdiction of the Court. But where the Crown is concerned it would be indecent in the first place to issue any command to it, and in the second place it would be nugatory, since it could not be enforced either by attachment or sequestration; and this seems to have been the view at first entertained by the Court of Chancery (*d*).

The question then arises, How has this practice of proceeding in Equity against the Crown arisen? It appears to have originated in a practice, not sixty years old, of obtaining the consent of the Crown upon a petition of right to be sued as a subject through one of its superior officers, usually the Attorney-General.

Petitions in Chancery before Bovill's Act. *Clayton* v. *Atty.-Genl.*

The first case in which this course seems to have been adopted was in the year 1834. In that year Sir William Clayton (*e*), who was lessee of certain lands held of the Duchy of Cornwall, which leases were, as he alleged, granted to him upon certain customary fines, having been refused a renewal of such leases upon such fines, sued a petition of right against the Crown, in whom the Duchy was vested. The prayer of the petition was special, and in the following words:—"That His Majesty would be graciously pleased to order that right be done in this matter, and to endorse his Royal declaration thereon to that effect, and to refer such petition, with such Royal order and declaration thereon, to the Lord Chancellor. And that the plaintiff might thenceforth prosecute his complaint therein against His Majesty's Attorney-General, as representing his rights and interests as Duke of Cornwall in the matters aforesaid, and that for such purpose the plaintiff might have leave to

(*d*) Thus in the foregoing case of *Penn* v. *Ld. Baltimore* it is stated that the reason why, in *Reeve* v. *The Atty.-Genl.* (2 Atk. 223) the Chancellor dismissed the bill was, that it claimed a declaration against the Crown which the Court had no jurisdiction to decree, suggesting that the suppliant's remedy was by petition of right.

(*e*) 1 C. P. Cooper's Repts. in Chancery, temp. Cottenham, p. 97 (1834).

make such Attorney-General, and also the aforesaid Lords Commissioners of the Treasury, parties thereto; and to pray and obtain such relief in such matters aforesaid as under the circumstances stated should be just."

What happened thereupon is not very clear. It appears, however, from a note made by Lord Brougham, that "it was agreed that, instead of this proceeding continuing in its course, a bill should be filed, to which no objection should be taken on the ground of prerogative, and that an answer should be put in."

This course was probably adopted because the proceeding by petition of right was, as Lord Brougham in his judgment calls it, "unusual." A bill was next put in, in which the suppliant prayed, *inter alia:*

(1) That it might be declared that the plaintiff was entitled to have a new lease granted to him on payment of the customary or of a reasonable fine.

(2) That a reference might be made to the Masters in Chancery to determine such customary or reasonable fine.

(3) That the defendants might be decreed to grant such leases upon payment of such fine.

(4) An injunction against the defendants restraining them from granting leases of the premises which should in any way prevent the renewal of the plaintiff's lease as prayed for.

An answer was put in by the Attorney-General, and ultimately the bill was dismissed.

Taylor v. *Atty.-Genl.*

Three years later a similar course was adopted with regard to another petition against the Crown (*f*). In this case the facts were as follows. By certain letters patent King

(*f*) *Taylor* v. *Atty.-Genl.*, 8 Sim. 413.

George IV. granted and demised to the Duke of York, for divers good considerations, all the mines, etc., within the province of Nova Scotia. At the time of those letters patent, Cape Breton was a part of this province, but there was some doubt whether the mines therein were intended to be included in the lease. At the death of the Duke of York, his Majesty claimed the mines in Cape Breton, and granted an agreement for a lease thereof to Messrs. Rundell & Bridge. The executors of the Duke of York thereupon presented a petition to his Majesty in his High Court of Chancery praying that "his Majesty would be graciously pleased to order that right be done in the matter aforesaid, and to indorse his Royal declaration to that effect on the petition, and to refer the same to the Lord Chancellor in the Court of Chancery; and that the plaintiffs might thenceforth prosecute their complaint in such Court against the Attorney-General as representing the rights and interests of his Majesty, and also against such other persons as might be necessary and proper according to the rules of equity, and that they might be at liberty to make the Attorney-General a party thereto; and to pray and obtain such relief in the matters therein mentioned as should be just." To this his Majesty was pleased to return the following answer: "Let right be done." Upon which the plaintiffs presented their petition to the Chancellor, praying "that they might be at liberty to file a bill in the Court of Chancery against the Attorney-General as representing the rights and interests of his Majesty, and against other persons," &c. The Lord Chancellor then made the order asked for, upon which the case proceeded against the Attorney-General (*g*).

A bill was thereupon filed alleging the facts above stated, with this variation, that the agreement for a lease was alleged to be an actual lease, and praying "That it might

(*g*) *Taylor* v. *Atty.-Genl.*, 8 Sim. 413, at p. 424.

be declared that the letters patent were valid to all intents and purposes, according to the true tenor, purport, and effect thereof; and that the Duke thereby became, and that the plaintiffs as his personal representatives then were entitled to the mines, &c., in that part of the province of Nova Scotia which is called the county of Cape Breton, and that the lease made to the defendants, Rundell and Bridge, was void, and that the counterpart thereof in their possession might be cancelled."

The Attorney-General put in an answer; but the plaintiffs succeeded ultimately in getting judgment in their favour, which, as no lease had been granted, simply consisted of the declaration asked for.

The two foregoing cases are apparently the only authorities previous to the passing of the Petitions of Right Act, 1860, for saying that the Crown is liable on claims in equity; and the question naturally arises whether, as the liability of the Crown is the same before and since the Act, they are sufficient authority for the practice which has arisen under the Act of presenting such claims against the Crown.

It is submitted that they are not. In the first place it should be noticed, that they are not, properly speaking, petitions of right at all, but only voluntary submissions of the Crown to the authority of the Court for the purpose of deciding particular questions, and therefore they could hardly be used as precedents in a case where the jurisdiction was disputed. Secondly, that they themselves do not rest upon any precedent whatever, no authority having been adduced on either side for the course which was adopted therein. Thirdly, the fact that the Attorney-General was the nominal defendant makes considerable difference, inasmuch as the Court would be able to make an order *in personam* against him which it could not were the Crown respondent.

Notwithstanding these facts, this course of proceeding against the Crown seems to have become the recognised one in the Court of Chancery at least, and ultimately to have been mistaken for petition of right proper.

Recognition of this practice by Wickens, V.-C.

Thus in *Kirk* v. *The Queen* (*h*), Vice-Chancellor Wickens says: "The original theory (*i*) of a petition of right was this: the subject applied to her Majesty for leave to sue her Majesty as he might have sued a subject; and the decision on the petition of right only went to say 'Let right be done.' Then it might be done in any way, as for instance in *Clayton* v. *Attorney-General*, by filing a bill against the Sovereign and a number of subjects. The result of a petition of right was, if successful, that her Majesty, not with reference to the remedy but the trial of the right, so to speak, descended from the throne and allowed herself to be sued before her own inferior officers just as if she were a subject; and proceedings were instituted in the same form, and with the addition of whatever other parties might be necessary or would be proper if the Queen had been a subject."

Petitions in Chancery since Bovill's Act.

However, since the passing of the Petitions of Right Act, several petitions of right have been presented claiming relief against the Crown upon equitable grounds, which are here given merely in chronological order, it being difficult to discover upon what principles the Court has acted. These cases should be regarded not so much as authorities showing for what a petition of right *can* but for what a petition of right *has* been brought in this division of the High Court.

Kirk v. *Reg.*, claiming an account, damages and injunction.

The first was the case of *Kirk* v. *The Queen* (*k*), quoted above. There the suppliant contracted with the Secretary of State for the War Department for the execution of certain

(*h*) L. R. 14 Eq. 558.

(*i*) The Vice-Chancellor does not give any authority for this "original theory."

(*k*) L. R. 14 Eq. 558 (1872).

public works in accordance with certain specifications and schedules, and under the direction of an engineer officer appointed to superintend the works. The contract contained a clause to the effect that the Secretary of State should be able to fix the time within which any proportion of the work was to be completed, and to determine the contract in case of undue delay. The suppliant did not proceed with due diligence, and ultimately when three-fifths of the time stipulated for the completion of the contract had elapsed and very little more than one-fifth of the requisite work had been done, notice was given him to suspend the proceedings and withdraw from the site of the works. This he refused to do, and presented his petition of right against the Crown and the engineer officer. In it he prayed the following relief: (1) An account and payment of what was due to him under the contract; (2) Damages in respect of the alleged breach of contract by the Crown in wrongfully determining the contract; (3) An injunction to restrain the Secretary of State from determining the contract and excluding the suppliant from the site; (4) A like injunction against the further employment of the aforesaid engineer officer as superintendent, and that he might pay the costs of the suit; (5) And for further relief.

Upon this petition the suppliant moved for an interlocutory injunction in the terms of paragraphs three and four of his petition, but the motion was ordered to stand until the hearing.

The case upon the hearing is not reported, and it is therefore difficult to see whether the suppliant ever ultimately recovered.

James v. *Reg.*, claiming a declaration of title.

The next case (*l*) was two years later, in which a decla-

(*l*) *James* v. *The Queen*, L. R. 17 Eq. 502 (1874); 43 L. J. Ch. 754; 30 L. T. 84; 22 W. R. 466.

ration of title and an order to convey certain property was sought from the Crown. The facts of the case have been given above (*m*), and it is needless to repeat them otherwise than shortly here. James Davis, a free miner of the Forest of Dean, applied for a vacant gale, and his application was duly entered in the books of the gaveller, who thereupon gave notice that a grant of the gale would be made on a particular day. Other applicants appeared whose claims were disallowed, but the grant of the gale was delayed until the free miner died, when his devisees presented a petition of right praying "that, by virtue of the application of James Davis, dated the 4th of November, 1868, the said J. Davis was entitled to have the gale specified in the advertisement dated the 28th of February, 1873, granted to him in priority to and to the exclusion of all other free miners of the said hundred, and that such gale ought accordingly to have been granted to him on the 14th of March, 1873; and that it might be declared that under the circumstances aforesaid the said gale ought now to be granted to the suppliants in right of the said J. Davis, deceased, upon the trusts of his will; and that the same might accordingly be granted by the gaveller to the suppliants as such trustees as aforesaid."

A demurrer by the Crown on the ground that the suppliants were not free miners was ultimately upheld, and disposed of the case (*n*).

Re Brain, claiming relief against forfeiture.

The same year another case dealing with the same subject-matter was heard (*o*). In this case, too, for the particulars of which the reader is referred to page 77, the suppliant

(*m*) Page 76.

(*n*) *James* v. *The Queen*, L. R. 5 Ch. D. 152; 46 L. J. Ch. 416; 36 L. T. 903; 25 W. R. 615.

(*o*) *Re Brain*, L. R. 18 Eq. 389 (1874); 44 L. J. Ch. 103; 31 L. T. 17; 22 W. R. 867.

claimed a declaration that the forfeiture by the Crown of a certain gale was illegal and of no effect, or, that if valid, he might be relieved against it upon certain terms, and that the gaveller might be restrained by injunction from granting the gale to any one else in the meantime.

In re Tufnell, claiming damages.

A few years later we find a petition in the Chancery Division for compensation and damages for breach of contract (*p*). The facts of this case were as follows:—

The suppliant had been employed by the Crown in the Army Medical Department of the service from the year 1841 to the year 1874, in which year he was retired upon half-pay compulsorily. The suppliant's contention was that he could not be so retired, inasmuch as in the year 1846 he had applied for and obtained from the Secretary at War the permanent appointment as doctor to the military provost prison at Dublin, and that the contract between himself and the Crown was that he should retain the medical charge of the military prison at Dublin during his life, or until incapacitated by infirmity or misconduct.

Under these circumstances the suppliant presented a petition intituled in the Chancery Division of the High Court praying, "that her Majesty might do what was just and right, and cause the suppliant to be compensated and indemnified for the loss, damage, or injury sustained by him, and for further relief."

The Attorney-General demurred on the ground that every officer holds his post absolutely at the pleasure of her Majesty; and, secondly, that under the Mutiny Act there is no power to constitute or to appoint a person to any office which is permanent.

The Court allowed the demurrer in a judgment which is chiefly interesting as laying down the principles upon

(*p*) *In re Tufnell*, L. R. 3 Ch. D. 164; 45 L. J. Ch. 731; 34 L. T. 838; 24 W. R. 915.

which military officers hold their commissions from the Crown; it is given here as an instance of one of those miscellaneous claims which have been brought in and entertained by the Chancery Division of the High Court.

Cooper v. Reg., claiming damages and declaration of title.

The next case (*q*) was one in which the suppliant claimed a declaration that he was entitled to certain compensation, and that it was payable to him. Here the facts were as follows:—The suppliant had from the year 1844 to the year 1865 been employed in her Majesty's Civil Service; for the first nine years of his service, that is from the time of his entering until the year 1853, he had occupied a post which in the latter year was abolished, and he was thereupon appointed to another but less lucrative post, which he held until the year 1865, in which year he applied for and obtained permission to retire from her Majesty's service on superannuation. It was upon the amount of the superannuation allowance that the difficulty arose.

The Commissioners of the Treasury had fixed it at £65 2*s*., which was twenty-one sixtieths of the salary he had received in his second post. The suppliant claimed compensation for the loss of office in 1853 and 1865, and also that his superannuation allowance should be calculated and paid to him, not upon the basis of the salary which he had received in his last office, but upon the basis of that salary, plus the compensation allowance which he contended he was entitled to receive in virtue of the abolition of the previous office.

Under these circumstances the suppliant presented his petition setting out the facts, and praying "for a declaration that on the abolition of his office in 1853 he was entitled to compensation for loss of office; or, had his service been continuous, he was entitled to compensation allow-

(*q*) *Cooper* v. *The Queen*, L. R. 14 Ch. D. 311 (1880); 49 L. J. Ch. 490 42 L. T. 617; 28 W. R. 611.

ance for loss of emoluments, and that when he was removed from office in 1865 he was entitled to compensation for such removal. That it might be declared that the annual sum awarded to him in 1865 by way of superannuation allowance should have been calculated on an income which included the value of such compensation allowance as might be ascertained to have been due to him in addition to the salary of his then office from 1853 to 1865. That the amount due in respect of the difference might be ascertained and declared payable to him."

The Attorney-General, on behalf of her Majesty, demurred generally. On the argument, the demurrer was supported on the ground that the decision of the Commissioners was final; while it was argued for the suppliant, that granted that the Commissioners could not be compelled to grant a pension, yet if they had granted it and made an obvious arithmetical or other mistake, the Court could rectify the error.

In the result the Court upheld the demurrer, and in so doing Vice-Chancellor Malins made the following observations, which from their applicability to a large class of the community it has been thought worth while to reproduce here:—"I am clearly of opinion that no claim for superannuation allowance under 4 & 5 Wm. 4 c. 24, and 22 Vict. c. 26, can in any case be enforced by the civil tribunals of the country, and that the civil servants must rely upon the decision of the Lords of the Treasury, who will say whether they will take the claim into their favourable consideration or not. But whether they do or do not err in their decision, it is made by the Act of Parliament absolutely binding and conclusive. There is no excuse, therefore, for having brought this matter before the Court, and the demurrer must be allowed with costs."

This was followed by the case of *Re Gosman* (*r*), in which a declaration was sought that the suppliants were entitled to certain leaseholds, and *Kinloch* v. *The Queen* (*s*), in which the suppliant claimed to be entitled to certain sums of money out of the Banda and Kirwee Booty, but the circumstances of these cases having been already given, it has not been thought necessary to repeat them here. *Re Gosman.* *Kinloch v. Reg.*

Lastly, in the *Northam Bridge Company* v. *The Queen* (*t*), certain tolls were unsuccessfully sought to be recovered from the Crown by a petition presented in the Chancery Division of the High Court. *Northam Bridge Co. v. Reg.*

(*r*) L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 29 W. R. 14; and 17 Ch. D. 771.

(*s*) *Weekly Notes*, 1884, p. 80; and 1882, p. 164; *Times*, Nov. 22, 1885.

(*t*) *Times*, 24th November, 1886.

CHAPTER XII.

Petitions in the Admiralty Division, and for Colonial Stock.

By 27 & 28 Vict. c. 25, s. 52, a petition of right under the Petitions of Right Act, 1860, may, if the suppliant thinks fit, be intituled in the Probate, Divorce, and Admiralty Division, in case the subject-matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a Prize Court within her Majesty's dominions, if the same were a matter in dispute between private persons.

By 40 & 41 Vict. c. 59, s. 20, a petition may be brought by any person claiming to be interested in any colonial stock or dividend thereon to which that Act applies.

No proceedings appear to have been taken at present under either of these Acts.

PART II.

PRACTICE.

23 & 24 VICT., CAP. 34.

An Act to amend the Law relating to Petitions of Right, to simplify the Proceedings, and to make Provisions for the Costs thereof.

[3rd July, 1860.]

WHEREAS it is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

To amend the Law, &c.] It would seem that the only amendment in the law relating to petitions of right which this Act has introduced is to afford the suppliant an alternative to the old common law method of proceeding, which still exists (*see* sect. 18). The liabilities of the Crown are neither enlarged nor diminished hereby (*see* proviso at the end of sect. 7), and, consequently, the suppliant's position, save for the above-mentioned alterations, is the same. The sum and substance of the alteration in procedure introduced is to apply the existing practice in actions to petitions of right.

Petitions of Right may be intituled in any of the Superior Courts at Westminster.

I. A petition of right may, if the suppliant think fit, be intituled in any one of the Superior Courts of Common Law or Equity at Westminster in which the subject-matter of such petition or any material part thereof would have been cognizable if the same had been a matter in

The form, nature, and contents of the Petition as in Schedule No. 1.

dispute between subject and subject, and if intituled in a Court of Common Law shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to her Majesty in the form or to the effect in the Schedule to this Act annexed (No. 1), and shall state the christian and surname and usual place of abode of the suppliant and of his attorney, if any, by whom the same shall be presented, and shall set forth with convenient certainty the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney.

A Petition of Right may be intituled, &c.] Since the Judicature Act of 1873 petitions have been intituled either in the Queen's Bench or Chancery Division of the High Court of Justice. A petition may also be intituled in the Probate, Divorce, and Admiralty Division. "A petition of right under the Petitions of Right Act, 1860, may, if the suppliant thinks fit, be intituled in the High Court of Admiralty in case the subject-matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a prize court within her Majesty's dominions if the same were a matter in dispute between private persons" (27 & 28 Vict. c. 25, s. 52). The jurisdiction of the High Court of Admiralty, mentioned in this section, was transferred (36 & 37 Vict. c. 66, ss. 16 & 34), to the Probate, Divorce, and Admiralty Division of the High Court. It may be noticed also that when a certain Admiralty jurisdiction was transferred to the County Courts by 31 & 32 Vict. c. 71, it was expressly provided (sect. 4), that "nothing in that Act or in any order in Council under it should confer on a County Court jurisdiction in any prize cause or in any other matter within 'The Naval Prize Act, 1864'" (*i.e.*, 27 & 28 Vict. c. 25). A petition intituled in one Court can be changed to another under sect. 4, *infra*.

Venue.] Before the Act no venue was named in the petition which was addressed to the king personally, and, if answered, sent into the Chancery. There a commission

issued of course to certain persons to find the suppliant's title, *i.e.*, the truth of the allegations in the suppliant's petition, and the finding thereon was returned into the Chancery; the finding having been returned, the Attorney-General, "being present in the Court of Chancery," was asked if he had anything to say to the petition on behalf of the Crown; whereupon he pleaded, and issue having been joined, a transcript of the record was sent into the King's Bench to be tried; "and where the parties descend to an issue then for the tryall thereof they of the Chauncery must award a *venire facias* retournable in the King's Bench at a certain day." Staunford's Prerog. cap. xxiii., fol. 77 b., the Attorney-General having a right to a trial at bar (*see* note to sect. 4, *infra*). This being so, it may be doubted whether, as the Act does not purport to increase the rights of the subject against the Crown, the subject now has the right as against the Crown to choose his own venue, or, if he does, whether the Crown could not get it changed so as to correspond with the old practice, which we have stated above. The Act is only imperative upon the suppliant to name a venue when his petition is intituled in a Common Law Court; this is so, no doubt, because at the time the Act was passed there was no venue but London for Chancery suits. Since then, however, the privilege of choosing a venue has been extended by the Rules of Supreme Court, 1883, to plaintiffs in every division of the High Court (Order 36, rule 1). As the rules which govern the procedure in actions between subjects are, so far as applicable, to extend to a petition of right (*see* sect. 7, *infra*), it may be that a suppliant upon a petition intituled in the Chancery Division may now choose his venue, but there has as yet been no decision thereon.

Change of Venue.] See proviso to sect. 4.

Such Petition, &c.] The title and venue have been already dealt with, the formal opening and conclusion are given in Schedule No. 1 to this Act. Appendix A. also contains some precedents of petitions of right which may perhaps be found useful. In printing, paper, division into numbered paragraphs, &c., and such formal details, the petition is in every respect similar to a statement of claim in an action. In drawing

it, although precision should be aimed at, it will not be held bad because technical language is not employed in the statement of the grounds of complaint. "A petition of right is framed like an article in a newspaper. It talks of persons being highly respectable and trustworthy gentlemen, and so on. It is not a pleading in the ordinary acceptation of the term, but it is framed in most general terms" (per Willes in *Tobin* v. *Reg.*, 32 L. J. C. P. at p. 224; 8 L. T. 730, at p. 730; 11 W. R. 915, at p. 916). "A petition of right, instead of being concise and definite, may be in very vague and wide terms" (per Erle, C.J., *ibid.* at pp. 221, 732, 915 respectively). There is one rule, however, which should be observed with regard to it, and which is thus given by Chitty (Prerog. p. 245, ed. 1820). "The petition must state the whole of the title or titles or claim of the Crown, for if it be found by a writ of search (*see* notes to sect. 5) that any title of the king be omitted, the petition shall abate, and the reason of it is because if, on this suit of petition the king shall take an issue with the party which is found against him, his highness then shall be concluded for evermore to claim by any of the points contained in the said petition" (quoting Settle, J., in Y. B. 9 Ed. 4, fol. 51, Staunford, Prerog. 73 b; Finch, Law, 256; 3 Black. Com. 256). And this statement of the conveyances or acts which give possession to the king must be specific, and it is not sufficient to allege them generally, *e.g.*, "that divers persons were seised, &c.," for a general statement of this sort makes the petition bad (Y. B. 3 H. 7, 6; Broke, Abridgment, tit. Peticion, 21). It is well also, where possible, to add an allegation that the petitioner is a British subject, as otherwise he may not be able to present a petition at all. (*See* Chapter VI.); and usually, where the petition arises out of matters passing between the subject and the Crown elsewhere than in England, it is added (*Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428).

The Prayer of the Petition.] A reference to form No. 1 in the Schedule shows that the statement of the facts upon which the suppliant grounds his claim is to conclude with a prayer for the relief which he considers himself entitled to. In

Staunford's time (temp. Eliz.) the "conclusions" or prayers of petition were either "general" or "special" (Prerog. fol. 73 a); the general one was a common form in these words: "que le roy luy face droit et reason;" for the special one there was, of course, no usual form of words, as it depended entirely upon what the suppliant asked. The former was used in all cases where the restitution of property was sought by the ordinary course of proceeding upon petition, and was "as much as if he had prayed restitution of that which he sueth for" (*ibid.*); the latter, where the same object was to be obtained by some process outside the ordinary course of proceeding, such as by the issue of a *scire facias* or "writ of deceit" (*ibid.*), in which cases the particular remedy required was asked for in the prayer. The tendency in modern cases has been to make the prayer of the petition special, the reason no doubt being that the suppliant has usually required something more than a mere restitution of property, and to proceed by a method other than the ordinary one. The following modern cases illustrate this:—*Clayton* v. *Attorney-General* (1 C. P. Cooper, 97); *Taylor* v. *Attorney-General* (8 Sim. 413); *Canterbury* v. *Reg.* (1 Phillips, 306; 12 L. J. Ch. 281; 7 Jur. 224); *Re Baron de Bode* (8 Q. B. 208; 10 Jur. 773); *Re Rolt* (4 D. & J. 44); in all of which the question was not the mere restitution of property and the prayer for (*inter alia*) "leave to sue the Crown by the Attorney-General joining any necessary parties" (*a*). Since the Act no general form of prayer has been in use; but the following are given as examples of the prayers with which petitions presented under the Act have concluded: "For £126,000 compensation for damages and losses" for an alleged breach of contract. (*Churchward* v. *The Queen*, L. R. 1 Q. B. 173; 6 B. & S. 808; 13 L. T. 57.) "A declaration of the suppliant's title to certain property, and that it ought to be granted to him; and that the same might accordingly be granted." (*James* v. *The Queen*, L. R. 17 Eq. 502; 43 L. J. Ch. 754; 30 L. T. 84; 22 W. R. 466.) "A declaration that a certain forfeiture was illegal and of no effect; or, if valid, then that the suppliant might upon certain terms be relieved from the effect thereof, and an

(*a*) See *supra*, p. 143.

injunction against a certain Crown officer." (*In re Brain*, L. R. 18 Eq. 389; 44 L. J. Ch. 103; 31 L. T. 17; 22 W. R. 867.) "That it might be ascertained under the direction of the Court who were the testator's next of kin, and upon such next of kin being ascertained, that it might be declared that they were entitled to testator's leasehold estates; and thereupon that her Majesty would be pleased to direct by a warrant under her sign manual that the Treasury solicitor (in whom the leaseholds were vested), should reassign the said leaseholds to the parties entitled, and account to the same for the mesne profits, &c." (*In re Gosman*, L. R. 15 Ch. D. 67; 49 L. J. Ch. 590; 42 L. T. 804; 24 W. R. 14.) "A return of the amount of £750, that sum having been paid in respect of property which was not the property of the testator at the time of his death." This was a petition by executors for return of probate duty. (*Perry* v. *The Queen*, L. R. 4 Ex. 27; 19 L. T. 520; 17 W. R. 382; *V.-C. Bacon* v. *Reg.*, 38 L. J. Ex. 5.) "That her Majesty may be pleased to direct the payment of the said sum mentioned in the petition to the suppliant, with interest, together with the costs of this petition." (*Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428.) "An account of what was due to the suppliant under the contract; damages in respect of the breach of contract; an injunction restraining the determination of the contract; costs and further relief" (*Kirk* v. *The Queen*, L. R. 14 Eq. 558.) "That her Majesty might do what was just and right, and cause the suppliant to be compensated and indemnified for the loss, damage, or injury sustained by him, and for further relief" (*In re Tufnell*, L. R. 3 Ch. D. 164; 45 L. J. Ch. 731; 34 L. T. 838; 24 W. R. 915). For an instance of a very long declaration asked for (*Cooper* v. *The Queen*, L. R. 14 Ch. D. 311; 49 L. J. Ch. 490; 42 L. T. 617; 28 W. R. 611). From the foregoing cases it will be seen that a practice has arisen of asking relief against the Crown in the prayer of the petition, in much the same terms and form as if it was a suit against the subject; thus, for instance, "orders," "declarations," and "injunctions" are freely asked for. Such a practice is at best questionable, and usually, by reason of the Crown being

defendant, wholly inapplicable. The pleader should never ask for anything in the prayer of his petition to which he was not entitled before the passing of this Act; and, in addition, should satisfy himself that he is asking for something for which judgment can be given in the terms herein provided.

The definition of the word "relief" used in this section should be noticed. "The word relief shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise" (sect. 16, *infra*).

Signing the Petition.] The petition must be signed either by the suppliant, or by his counsel, or by his solicitor.

II. The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that her Majesty, if she shall think fit, may grant her fiat that right be done; and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

Petition to be left with the Secretary of State for the Home Department for her Majesty's fiat.

In order that the same may be submitted, &c.] Though the Act does not expressly say so, the petition is submitted by the Home Secretary, who also advises her Majesty whether to grant or withhold her fiat. In order to render himself competent to give such advice, he usually takes the following course. He first puts himself in communication with the department of Government, if any, to which the petition relates, &c., *e.g.*, with the War Department, Admiralty, Woods and Forests; and having forwarded to the department a copy of the petition, asks for the opinion of the department upon the claim. The department thus communicated with draws up a memorandum upon the question raised by the petition, either admitting or denying the facts upon which it is founded, and adding any additional facts which, in the opinion of the department, are material for the consideration of the case; and then returns the petition with the memorandum to the

Home Secretary, who forwards them both to the law officers of the Crown for the time being for their opinion thereon, *i.e.*, to say whether or not the claim is a good legal one, and then advises the Crown in accordance therewith.

That it is the duty of the Home Secretary to submit the petition there seems no doubt. Thus Lord Langdale, M.R., in giving judgment in a recent case said: "I am far from thinking that it is competent for the king, or rather for his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. The form of the application being, as it is said, to the grace and favour of the king, affords no foundation for any such suggestion" (*Ryves* v. *Duke of Wellington*, 9 Beavan, 579; 15 L. J. Ch. 461; 10 Jur. 697).

A curious point in connection with this "submission of the petition" by the Home Secretary arose in a recent case, which was this: whether such a submission of the petition to the Crown as we have indicated above, viz., coupled with advice upon it to refuse the fiat, was a "submission" within the meaning of the Act. It was held that it was. The point arose as follows. One Irwin brought an action against Sir George Grey, the Home Secretary, "for not submitting to her Majesty a petition of right presented by the plaintiff under Bovill's Act, whereby he was prevented from having the same prosecuted, and had been in various ways injured and damnified." Plaintiff called the defendant, who proved that he had submitted the petition with advice not to grant the fiat. Upon which the plaintiff proposed to shew that such a submission was not a submission within the Act, but the judge (Erle, C.J.) overruled the objection, and directed a verdict for the defendant. Subsequently the plaintiff moved for a new trial before Williams, Willes and Keating, JJ., but took nothing (*Irwin* v. *Grey*, 3 F. & F. 635).

The Home Secretary, it is submitted, is not bound to disclose the advice which he may give to the Crown.

In order that her Majesty, if she shall think fit, may grant her fiat that right be done.] What the fiat is. What is called the "fiat" in this statute is equivalent to what was called the "endorsement" before it, and this "endorsement" was

nothing more than the answer of the Crown to the prayer of the petition endorsed upon the petition. It may help us to understand the position of the modern fiat to see what rules, if any, regulated the endorsement.

The granting of the fiat is an act of grace.] In the first place, the granting of the endorsement was a pure act of grace. Any petitions which either affected the king's title to property, or were applications for his grace, were called "*coram rege*" petitions (Elsynge on Parliaments, 1768, p. 288, and cases there cited); that is, could not be answered or endorsed "*rege inconsulto*" (*ibid.*); evidence that this formerly was so appears in the practice of the present day, the personal answer of the Sovereign being still requisite in both such cases. But though no one else could answer such petitions, it does not appear that the Crown was bound to do so, and certainly there appears to have been no method of compelling it to do so, process in the nature of *mandamus* being inapplicable, as "the king cannot command himself." The answer or endorsement must have been therefore a purely voluntary act, whether the suppliant sought to recover property or obtain a favour, though doubtless he had a stronger "moral" claim in the former than in the latter case. In the same way and for the same reasons it is submitted that the granting of the "fiat" is a purely voluntary act, and that the Crown cannot be compelled to grant it. This is the view which was taken by the Court of Common Pleas in a recent case. "It is said that sect. 7 of the 23 & 24 Vict. c. 34 applies, and that the legislature has taken away the Queen's prerogative and given a right of action. I think that the words of the statute by no means justify that statement. The words of sect. 2, so far from giving the subject a right of action against the Queen absolutely, which every subject has who claims to have an action against a fellow-subject, suing out a writ, are as follows (quoting them). The prerogative is recognized and remains." Per Erle, C.J. (*Tobin* v. *Reg.*, 14 C. B. (N.S.) 505, at p. 521; 32 L. J. C. P. 216, at p. 221; 8 L. T. 730, at p. 731; 11 W. R. 915, at p. 915; 9 Jur. (N.S.) 1130, at p. 1133).

Form of the fiat.] We do not, however, find that the Crown

was in the habit of capriciously refusing the endorsement, and the next thing for us to consider is the form it took when given. In the first place, it was endorsed upon the petition. Its verbal form necessarily depended a good deal on what the petition asked for; speaking generally, a suppliant might ask for and the Crown grant almost anything, subject of course to other people's rights; and so in the Rolls of Parliament we find answers or endorsements in almost every conceivable form (Elsynge, *ibid.*, pp. 288–298). But, as might be expected, similar answers were given to similar requests; and hence in cases where the suppliant sought the restoration of property one stereotyped prayer, the form of which we have considered above, and one stereotyped answer, viz., "Soit droit fait als parties," came into existence. It is difficult to say when precisely this practice became customary; but in Staunford's time it was the usual answer (*see* Staunford's Prerog., Chap. xxii. fol. 73 a). But, although this was the usual "course of business," the suppliant never seems to have lost the right of asking, or the Crown of granting, any "special prayer" of the suppliant's, even in cases where the petition was for the restitution of property; and so endorsements were not only "general," *i.e.*, in the above form, but also "special," *i.e.*, in terms suitable to the requirements of the case (Staunford's Prerog., Chap. xxii., 73 a). Formerly a great deal of time and labour might be saved by these special endorsements, *e.g.*, if the petition concluded specially that the king should command his justices of B. R. or C. B., and it was so endorsed, all the preliminary proceedings such as inquisition were avoided (Com. Dig., tit. Prerog. [D. 80].) All the learning upon this subject continued up to the passing of this Act, and was recognized as good law (*Ex parte Perring*, 6 L. J. [N.S.] Ex. 253). Whether or not a special endorsement or fiat can be given under this Act is an open question; the section only mentions one form, viz., "That right be done," upon which the course of proceeding indicated in the Act is to be adopted. Supposing, however, there was a shorter way out of the difficulty, it might be expedient to proceed at common law and conclude with a special prayer. It should also be noticed,

that though the prayer is general the endorsement may be special (Staunford's Prerog., Chap. xxii., fol. 73 b.): "For howsoever the conclusion in the petition may be, the indorsement may be always as it shall please the king."

Effect of fiat.] "And note that when the petition is indorsed the party must follow and pursue the same according to the endorsement, or otherwise his suit is void, because the endorsement is his warrant therein, as appeareth in Peticion 1 M. 18 E. 3, P. 22 Ed. 3, 5, and Peticion 18 H. 46 Ed. 3 (Staunford's Prerog., Chap. xxii., fol. 73 a). So ever the following and pursuing of the thing must bee according to the endorcement, for howsoever the conclusion in the peticion be, the endorcement may be always as it shall please the king as me seemeth, and according to that the party must pursue it (*ibid.*, fol. 73 b)."

Upon Fiat being obtained, Petition, &c., to be left at Office of Solicitor of the Treasury endorsed as in Schedule No. 2.

III. Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury, with an endorsement thereon in the form or to the effect in the Schedule (No. 2) to this Act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days, and it shall thereupon be the duty of the said Solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct.

Such petition shall be left at the office of the Treasury Solicitor.] Where the petition is proceeding in the Chancery Division the copy so left must be a printed and sealed one, otherwise the leaving will not be good under this section (Order 1st Feb. 1862, r. 3; Morgan 201, 202, and see note to sect. 15, *infra*); the same practice may also be followed in the Queen's Bench Division:" see also note below on filing the petition which should precede delivery to the Treasury Solicitor.

With regard to the endorsement, on marking a copy of a

petition of right for service a fee of 5*s.* is payable by a stamp impressed on the copy. Order as to Supreme Court Fees 1884, Schedule No. 16; Order as to fees, &c., July 1884, at p. 4.

And it shall thereupon be the duty of the Treasury Solicitor, &c.] At the date when this section was enacted the various public departments had their separate solicitors, and the Treasury Solicitor's duty was simply to put the suppliant in communication with the departmental solicitor, who was responsible for the further conduct of the case, and to whom all further notices, pleadings, &c., on behalf of the suppliant were delivered. Where this is still the case, the course stated above will be followed; and the Treasury Solicitor having transmitted the petition under this section will be *functus officio*. Some departments, however, *e.g.*, the War Department, Admiralty, &c., have no separate solicitor, the legal work being done by the Treasury Solicitor; in these cases the litigation will be conducted by him or his agents upon the instructions of the department.

The particular department, &c.] It should be remembered that the petition may relate not only to some department of State, but may "affect her Majesty in her private capacity" (sects. 11, 13 and 14); the Act does not say to whom in such cases the petition should be transmitted, but possibly to the "Lord Treasurer or such other person as her Majesty shall appoint," he being the person named to represent her Majesty in other parts of the Act for other purposes.

Filing the petition.] By the Central Office Practice Rules, 1880–2, "petitions of right" are amongst the "documents to be filed in the Writ, and Appearance, and Summons, and Order departments."

On filing a petition of right a fee of £1 is payable by a stamp impressed upon the petition "where practicable;" where not, then upon a *præcipe* to be filed. (Order as to Supreme Court Fees 1884, Schedule No. 28; Order as to fees, &c., July 1884, p. 6.)

The filing should immediately follow the granting of the fiat. "Upon her Majesty's fiat being obtained to any petition of right presented in pursuance of the (Petitions of Right) Act, and intituled in the Court of Chancery (now

Chancery Division), such petition with the fiat thereon, together with a printed copy of such petition and fiat (if the petition is in writing), shall be filed at the Office of the Clerks of Records and Writs (now Central Office). (Order 1, Feb. 1862, Morgan 201, 202, and see note to sect. 15, *infra*).

In such other Court, &c.] See notes to next section as to the way in which the change is made.

Time for answering by the Crown.

IV. The time for answering, pleading, or demurring to such petition, on behalf of her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the Solicitor to the Treasury, or such further time as shall be allowed by the Court or a Judge: Provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General, or of the suppliant, to change the Court in which petition shall be prosecuted, or the venue for the trial of the same.

Power to change the Court or venue.

As shall be allowed by the Court or a Judge.] The Court or Judge here spoken of probably means the "Court" or "Judge" as defined by sect. 16 of this Act, which does not include a "Master."

Lawful for the Lord Chancellor, &c.] It is not very clear how this application is to be made, but probably the practice relating to the transfer of causes from one Court to another under the Supreme Court Rules, 1883, would be followed, viz., that where all parties consent thereto the direction will be given on a written application to his secretary, accompanied by the written consent of all parties; but where they do not all consent the application must be made to the Lord Chancellor in Court (Memorandum, L. R. 1 Ch. D. 41). "The king appears by his prerogative to have the right of suing in any Court he pleases" (Com. Dig., Prerog. D. 85); there seems to be no authority saying whether this prerogative is the same when he is *quasi*-defendant to a petition of right.

Change the venue for the trial, &c.] Except for the matter

mentioned in the note to sect. 1 of the Act, it seems doubtful if the Crown has, in virtue of its prerogative, any right of choosing its own venue except in personal actions in which it is plaintiff (see *Attorney-General* v. *Churchill*, 8 M. & W. 171). It, however, has been enacted by 28 & 29 Vict. c. 104, s. 46 (the Crown Suits Act, 1865), as follows: "Where a cause in which her Majesty's Attorney-General on behalf of the Crown is entitled to demand as of right, a trial at bar is at any time depending in any of her Majesty's superior Courts of Law at Westminster, whether instituted before or after the commencement of this Act, and the Attorney-General states to the Court that he waives his right to a trial at bar, the following provisions shall have effect: (1) The Court on the application of the Attorney-General shall change the venue to any county in which the Attorney-General elects to have the cause tried." There appears to be no exact decision whether petition of right is a "cause in which her Majesty's Attorney-General is entitled to demand a trial at bar" within the meaning of the Act, so as to make this provision applicable thereto; but the Court of Appeal, in a recent judgment, seem to have expressed a very strong opinion that it was (*Dixon* v. *Farrer*, L. R. 17 Q. B. D. 658; 55 L. J. Q. B. D. 497; 55 L. T. 438; on Appeal, L. R. 18 Q. B. D. 43; 56 L. J. Q. B. D. 53; 55 L. T. 578), and cases were then cited which seem to place the matter beyond doubt. And there seems to be other authority to the same purpose; for instance: "When the Crown is immediately concerned, the Attorney-General has a right to demand a trial at bar" (Tidd's Practice, 9th ed., p. 748, quoting 1 Str. 52, 644; 2 Str. 816; 1 Barnard, K. B., 88 S. C.); "In the Exchequer no *nisi prius* shall be granted where the king is a party where the Attorney-General does not consent." (Com. Dig., Prerog., D. 85.) For the method in which this application is made see *Dixon* v. *Farrer* (*supra*). The section does not seem to authorize an application for a change of court or venue by a third party brought in under sect. 5.

Time for answering by other

V. In case any such petition of right shall be presented for the recovery of any real or personal property,

or any right in or to the same, which shall have been granted away or disposed of by or on behalf of her Majesty or her predecessors, a copy of such petition, allowance, and fiat shall be served upon or left at the last or usual or last-known place of abode of the person in the possession, occupation, or enjoyment of such property or right, endorsed with a notice in the form set forth in the Schedule (No. 3), requiring such person to appear thereto within eight days, and to plead or answer thereto in the Court in which the same shall be prosecuted within fourteen days after the same shall have been so served or left as aforesaid; and it shall not be necessary to issue any *scire facias* or other process to such person for the purpose of requiring him to appear and plead or answer to such petition, but he shall within the time so limited, if it be intended by him to contest such petition, enter an appearance to the same in the form set forth in Schedule (No. 4) to this Act annexed, or to the like effect, and shall plead, answer, or demur to the said petition within the time specified in such notice, or such further time as shall be allowed by the Court or a Judge.

persons, parties to the petition.

Previous to the passing of this Act, where the property sued for had been granted over to a third party, the course was as follows:—

In the first place, it was necessary to get back the property into the hands of the Crown. For this purpose, as soon as the petition was presented a writ of *scire facias* issued from the Chancery, by which the sheriff was commanded to "give notice to the said grantee that he be before us in our Chancery on (such a day), to show if he hath or knoweth of anything to say for himself why the said letters patent granted to him ought not to be cancelled" (Tidd's Practice, Appendix, p. 447, ed. 1840); the grantee so summoned was entitled to a writ of search "to be awarded into the Treasury

to search what he can find for the king's title," and this "ere the party shall enterplead with the king" (Staunford, Prerog., cap. xxii., fol. 73 b, 74 a); having found thereby what he could to support his title, he then pleaded or demurred, and judgment was given thereon (Chitty's Prerog., p. 330), affirming or repealing the letters patent. As the question whether or not the "letters patent" were good depended upon what title the Crown had to the property granted, the judgment on the *scire facias* practically decided the petition; but, no doubt, where the letters patent were repealed and the property thereby reverted to the Crown, a judgment of *amoveas manus* was given upon the petition in order to transfer the property from the Crown to the suppliant.

That this was the usual course appears from Staunford, who says: "And note that in every peticion where the king hath granted the land over to another a *scire facias* must be awarded against the patentee" (Prerog., cap. xxii., fol. 73 b.); and Coke makes the same statement with some little variation (Saddler's Case, 4 Rep. 59 b); and that the *scire facias* was for the purpose of repealing the letters patent appears clear (see Broke's, Abridgment, tit. Pet., 11, 8).

So much for the practice before the Act, which has introduced the following change.

In the first place, all the proceedings upon *scire facias* have been abolished. This seems to have been done under a mistake; the framers of the Acts appear, from their language in this section, to think that the object of a *scire facias* was not what we have stated, but only to bring in the grantee as co-defendant. That such was their idea appears also from the fact that while they have given new means of making the grantee a third party, they have given none for repealing the letters patent; consequently, even if the suppliant suceeeds he will be met with what, on the face of it, is a valid conveyance to the third party.

The proceedings substituted for *scire facias* are sufficiently explained in the words of the section.

It should be noticed, however, that the Act does not provide for the person to whom the property has been granted away or disposed of being brought in to defend, but

only the person in the "possession, occupation, or enjoyment of the property;" and as there is apparently no obligation on such person to inform the owner of what is going forward, or any provision made for his coming in even if he wishes to do so, his interests may be very prejudicially affected through the operation of this section.

On marking a copy of a petition of right for service a fee of 5*s.* is payable by a stamp impressed on the copy. (Order as to Supreme Court Fees, 1884, Schedule No. 16. Order as to fees, &c., for July, 1884, at p. 4.)

It would seem that a third party brought in under this rule is entitled to defend *in forma pauperis*, at all events in the Chancery Division: "Any person who might, if a defendant to an ordinary suit in this Court, have been admitted to defend *in forma pauperis*, may be admitted to make his defence *in forma pauperis* to any petition of right instituted in this Court which he may be required to plead or answer to (Order of 1st Feb. 1882, rule 5. Morgan 201, 202, and note to sect. 15, *infra*). For method of defending *in forma pauperis*, Supreme Court Rules 1883, Order XVI., rules 22–31.

As to serving the third party with a copy of interrogatories for his examination simultaneously with the copy of the petition where it is intituled in the Chancery Division, see Chancery Order, Feb. 1, 1862, rule 4, Morgan 201, 202 (and note to sect. 15, *infra*).

With regard to the entry of appearance, it should be made at the same place as in an ordinary action, viz., the Central Office: the summons for extension of time would seem, from the definition of "Court" and "Judge" in sect. 16, to be a Judge's summons.

Before appearing it would be well for the third party to consider whether he can put forward any further or better defence than his grantor the Crown, and if not, to let the petition be taken *pro confesso* against him under sect. 8. In the notes to sect. 7, this point is further considered.

VI. Such petition may be answered by way of answer, plea, or demurrer in a Court of Equity, or in a Court of Common Law by way of plea or demurrer, or by both

The answer or plea to such petition.

pleas and demurrer, by or in the name of her Majesty's Attorney-General on behalf of her Majesty, and by or on behalf of any other person who may in pursuance hereof be called upon to plead or answer thereto, in the same manner as if such petition in a Court of Equity were a bill filed therein; or if the petition be prosecuted in a Court of Common Law as if the same were a declaration in a personal action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant; and such and the same matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of her Majesty may be alleged on behalf of any such other person as aforesaid called on to plead or answer thereto.

Object of this section.] "Sect. 6 of 23 & 24 Vict. c. 34, does not relate in the least to the form of pleading by the Crown, but takes away that which was needed to support petitions of right in old times, namely, an inquisition finding certain facts" (*per* Erle, C.J., *Tobin* v. *Reg.*, 14 C. B. N. S. 505, at p. 521; 32 L. J. C. P. 216, at p. 222; 9 Jur. N. S. 1130, at p. 1131; 8 L. T. 730, at p. 731; 11 W. R. 915, at p. 915). "Sect. 6 is an enabling clause, but it is only such in terms, because in fact the Crown would have had such power without any enactment" (*per* Willes, J., *ibid.*, at pp. 524, 223, 1134, 732).

Pleading by the Crown.] The prerogatives which the Crown possesses in the matter of pleading, as also the present practice on demurrer, are pointed out in the notes to the next section.

By or in the name of her Majesty's Attorney-General, &c.] The form in which a plea or demurrer on behalf of the Crown runs is as follows: "Her Majesty's Attorney-General, who for our Lady the Queen defends, says, for and on behalf of our Lady the Queen, that the said several matters and things in the said petition contained, specified, and set out are not, nor is any one of them, nor any part thereof, true in fact;"

or "that the said petition is not good and sufficient in law inasmuch as (stating grounds of objection)."

Pleadings, answers, or demurrers by third party.] By the previous section these must be delivered within fourteen days from the time of being served with the petition; the grounds of defence of which a third party can avail himself will now be considered.

As the issue upon every petition is simply whether or not the suppliant is entitled to the property, the defences which are open to the third party under the proviso in this section enabling him to plead any defence which the Crown might set up, are, in addition to objections in law a traverse of one or more of the facts upon which the suppliant grounds his claim, or a confession and avoidance of it by alleging some matter sufficient to give title to the Crown, notwithstanding the suppliant's suggestions.

It should be borne in mind, however, that the Crown does not retire from the proceedings because a third party is added, and, it is fair to suppose, knows its own title at least as well as the third party, especially as the latter does not now appear to be entitled to a writ of search. This being so, all the defences which the third party could raise will probably be raised by the Crown, which defences he will apparently have to repeat in order to avoid having the petition taken *pro confesso* against him under sect. 8.

Whether the "possessor" can avail himself of the Statute of Limitations has not been decided, but certainly the Crown cannot, as the Act only applies to actions between subjects (*see* per Blackburn, J., in *Rustomjee* v. *Reg.*, L. R. 1 Q. B. D. 487, at 491; 45 L. J. Q. B. 249; 34 L. T. 278; 24 W. R. 428), and therefore presumably the "possessor" cannot. Whether the plea of "possession" merely will have the same meaning as in actions for the recovery of land between subjects (upon which, *see Danford* v. *McAnulty*, L. R. 8 App. Cas. 456) is uncertain.

VII. So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, The practice and course of procedure in action

and suit between subject and subject shall extend to petitions of right, so far as applicable.

and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

This section should be considered with sect. 15, *infra*. These sections taken together seem to shew that the practice in actions between subjects existing at the date of the passing of this Act was applied to petitions of right as a temporary expedient, until rules of procedure had been drawn under sect. 15; and that when such rules were drawn they were to supersede the practice under this section. Sect. 15, however, was repealed after an order had been drawn up for the regulation of proceedings upon petition in Chancery, but before any similar rules had been made thereunder in the Common Law Courts (*see* note to sect. 15), and as a substitute for the power thus taken away, it was enacted that the Supreme Court's power of drawing rules of procedure in actions should extend to petitions of right. At present the Supreme Court has not exercised this power, and so the procedure continues to be governed by this section.

So far as the same may be applicable.] The meaning of these words seems to be as follows. The Crown has always had a certain prerogative in matters of pleading and procedure, which has not been taken away by this statute. "It is said that sect. 7 of the 23 & 24 Vict. c. 34 has taken away the Queen's prerogative, and subjected the Crown to all the

rules of pleading. I think that the words of the statute by no means justify that statement. The prerogative is recognized and remains" (per Erle, C.J., *Tobin* v. *The Queen*, 14 C. B. N.S. 505, at p. 520; 32 L. J. C. P. 216, at 221; 8 L. T. 730, at 731; 9 Jur. N.S. 1130, at p. 1133; 11 W. R. 915, at p. 915). "The Petitions of Right Act, 1860, has not interfered with the prerogative of the Crown in matters of pleading and procedure" (per Bowen, L.J. *arguendo*, *Tomline* v. *The Queen*, L. R. 4 Ex. Div. 252, at 254; 48 L. J. Ex. 453, at p. 454; 40 L. T. 542, at p. 543; 27 W. R. 651, at p. 651). The above words "so far as applicable" recognise this fact, and in effect mean "where not inconsistent with the prerogative which the Crown has in such matters."

In the following note an attempt has been made to collect some of the various cases which shew what part of the practice between subjects is and what is not "applicable;" but before passing on this preliminary statement should be made that, speaking generally, the various statutes regulating the practice in actions and suits between subjects are wholly inapplicable to petitions of right, since the latter are not usually named therein.

Pleading.] The Crown appears to have distinct prerogatives in pleading which, however, are not perhaps so important as formerly, since in some cases a similar license has been extended to the subject. Thus the Crown may always "plead and demur, reply and demur, or in any other way plead double" (per Williams, J., in *Tobin* v. *The Queen*, 14 C. B. N. S. 505, at p. 512; 32 L. J. C. P. 216; 8 L. T. 730, at p. 7; 9 Jur. N. S. 1130, at p. 1132; 11 W. R. 915); and the Court refused to strike out under the Common Law Procedure Act of 1852, as "embarrassing" a "general denial" pleaded by the Crown in the following words: "that the several averments and statements contained in the said petition of right are not, nor is any of them, true in fact (*ibid.*);" and generally the statutes relating to pleading have no application to the Crown (per Willes, J., *ibid.*), for other "privileges which the king shall have in suits." *See* Com. Dig., tit. Prerog. D. 85.

Limitation, Statutes of.] Although "the Statute of Limitations has relation only to actions between subject and subject, and the Crown cannot be bound by it" (per Blackburn, J., in *Rustomjee* v. *Reg.*, L. R. 1 Q. B. D. 487, at 491), it has been enacted by the Intestates' Estates Act, 1884, "That after the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted and a petition of right shall not be presented in respect of the personal estate of any deceased person or any part or share thereof or any claim thereon except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject (47 & 48 Vict. c. 71, s. 3).

Venue.] As to right of choosing, *see* notes to sect. 4, *supra.*

Demurrer.] A question may possibly arise as to what course the Crown should adopt with regard to objections in law: whether they should still be raised by demurrer, or on the pleadings under Order 25, rule 1, Supreme Court Rules, 1883. Both courses seem to have been employed. Thus in *De Dohsé* v. *The Queen* (*Times*, 20th March, 1885, and 3rd June, 1885); *Kinloch* v. *The Queen* (W. N. 1884, p. 80); *Northam Bridge Company* v. *The Queen* (*Times*, 24th November, 1886); objections in law seem to have been raised by demurrer, but in *Eyre and Others* v. *The Queen* (*Times*, 8th June, 1886), upon the pleadings under the above rule.

Interrogatories.] It would seem that the suppliant has the right of interrogating a third party brought in under sect. 5, *supra*, at all events where the petition is intituled in the Chancery Division. "A suppliant in any petition under the said Act desiring to file interrogatories for the examination of any person or persons who may be required to plead or answer thereto (other than her Majesty's Attorney-General) shall file such interrogatories at the same time as such petition. And a copy examined and marked by the Clerk of Records and Writs of the interrogatories which any respondent is

required to answer, shall be served upon such respondent together with a copy of the petition. (Chancery Order, 1st February, 1862, rule 4, Morgan 201, 202, *see* notes to sect. 15.)" The third party, therefore, would probably be held to have the reciprocal right of interrogating the suppliant. Neither the third party nor the suppliant would seem to have any right to interrogate the Crown or the Attorney-General for the same reasons as those upon which discovery has been refused (*see* following note on Discovery of Documents, *infra*); there seems no reason why the practice relating to interrogatories should be held to be "inapplicable," when administered by the Crown to a suppliant (*ibid*).

Discovery of Documents. By the Suppliant against the Crown.] The suppliant cannot obtain an order for discovery of documents against the Crown. This was established in *Thomas* v. *The Queen* (L. R. 10 Q. B. 44; 44 L. J. Q. B. 17; 32 L. T. 59; 23 W. R. 345), which was a case of an application under sect. 50 of the Common Law Procedure Act of 1854; the reasons which were urged by the Crown in resisting the application were as follows:— "That the Queen was not specially named in the statute; that she is not such a corporation as can answer by officers; and that she herself cannot be compelled to answer on oath; and that the document which a suppliant seeks to discover may be such as, by reason of public policy, ought not to be set out in the schedule to an affidavit of documents" (*see* Bowen's argument in *Tomline* v. *The Queen*, L. R. 4 Ex. D. 252; 48 L. J. Ex. 453; 40 L. T. 542; 27 W. R. 651). The Court refused the application on the ground that "if it had been intended to extend sect. 50 to the case of petitions of right, there would have been inserted some enactment saying an officer should answer, as in the case of bodies corporate" (*a*).

(*a*) Possibly a third party may be entitled to some discovery against the Crown in lieu of and for the same purposes as the writ of search which formerly used to issue on his behalf (see notes to section 5, *supra*).

As to whether the Crown is by the common law such a corporation as can answer by the oath of its officers, that is ministers, *see* Bacon's Abridgment, title Corporations A. Grant on Corporations, pp. 626, 627; and as to the non-production of state papers in a court of justice, the judgment of Pollock, C.B., in *Beatson* v. *Skene*, 3 H. & Colt, 853.

By the Crown against the Suppliant.] That the Crown can obtain discovery of documents against a subject was decided in *Tomline* v. *The Queen*, L. R. 4 Ex. D. 252; 48 L. J. Ex. 453; 40 L. T. 542; 27 W. R. 651. Bramwell, L.J., in giving judgment, said as follows: "I have not the least doubt that the practice as to discovery is 'applicable' to petitions of right, when it is the Crown which seeks discovery from the suppliant. The case before us may be disposed of on this short ground. It is unnecessary to consider whether *Thomas* v. *Reg.* was correctly decided; but I will assume that technical reasons exist which prevent a suppliant from obtaining discovery; do these technical reasons make the practice as to 'discovery' less applicable as against a suppliant? I think not; the practice is as much applicable as to him as to the plaintiff and defendant in an ordinary action. I repeat that it is unnecessary to express any opinion as to *Thomas* v. *Reg.*, but I may remark that if technical difficulties do exist in the way of obtaining discovery from the Crown, possibly the legislature has intentionally left those difficulties in existence, in order that it may be in the discretion of the Crown whether it will afford the information sought for by the suppliant."

Set-off.] "Sect. 7 of 23 & 24 Vict. c. 34 extends to a petition of right set-off *inter alia*" (per Lush, J., in *Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487, at p. 491; 45 L. J. Q. B. 249, at p. 253). "Under sect. 7 of 23 & 24 Vict. c. 34 the Crown is entitled to plead a set-off in answer to a petition of right" (per Kelly, C.B., in *De Lancy* v. *The Queen*, L. R. 6 Ex. 286, at p. 288; 40 L. J. Ex. 198, at p. 200; 19 W. R. 932, at p. 933).

Security for Costs.] "The Crown cannot be called upon to give security for costs, although the Petitions of Right Act, 1860, s. 7, incorporates the practice as to security for costs" (per Bramwell, L.J., *Tomline* v. *The Queen*, L. R. 4 Ex. Div. 252, at p. 254; 48 L. J. Ex. 453), but may call upon the suppliant to do so.

As to the time for making such application, see *Wood* v. *The Queen* (7 Canada, S. C. R. 631).

Special Case.] The rules as to seem applicable, *see Percival and Others* v. *The Queen* (33 L. J. Ex. 288; 10 L. T. N.S. 623), where a special case was stated by Judge's order under the Common Law Procedure Act, 1852, s. 46, and see also *Burke* v. *Reg*, *Times*, 29th of May, 1869.

Nonsuit.] There seems to be no doubt that at common law the suppliant could be nonsuited upon his petition. This Staunford seems tacitly to admit when he goes on to discuss the question whether, after the nonsuit, the suppliant can have a new petition. "And learn," he says (Prerog. cap. xxii., fol. 76 a), "if a peticion be sued for landes and the plaintiff be nonsuite, whether it be *pemptorie* or not, because some saye that that suite is as it were his write of right, and hereof see the book: H. 11, H. 4, fol. 52, and M. 3, H. 7, fol. 14."

Upon the question whether a nonsuit is peremptory, *i.e.*, final or not, see Manning, Exchequer Practice, 2nd ed. 85; Chitty, Prerog. 349, and cases there cited. The cases which seem to shew that it is not are Y. B. 4 H. 6, 12; Broke's Abridg., Travers. 16; Y. B. 11 H. 4, 52; Broke's Abridg., Nonsuit, 12; Y. B. 3 H. 7, 13; Broke's Abridg., Petition, 22. If it is not, then after a nonsuit a suppliant can bring a new petition. See also upon this subject, Staunford, Prerog. cap. xx.; Travers. fol. 65 b.

Suing in formâ pauperis.] This seems allowable, at all events in the Chancery Division: "Any person who might be admitted to prosecute a suit in this Court *in formâ pauperis* may be admitted to prosecute *in formâ pauperis* a petition of right intituled in this Court." [Chancery Order, 1st Feb. 1862, rule 5; Morgan 201, 202. Notes to sect. 15 of this Act.]

Provided always that nothing in this statute, &c.] Referring to this provision the Court of Common Pleas said in a recent case: "The statute 23 & 24 Vict., c. 34, alters only the form of procedure to be adopted by suppliants resorting to a petition of right, and does not alter the law relating to the subjects for which the petition can be maintained, it being expressly declared by sect. 7 that no remedy was thereby given which was not before existing. (*Per curiam, Tobin* v. *Reg.* 16 C. B. N.S. 310, at p. 353; 33 L. J. C. P. 199, at p. 205; 10 Jur. N.S. 1029, at p. 1032; 10 L. T. 762, at p. 764; 12 W. R. 838, at p. 841.)

Decrees or judgments by default.

VIII. In case of a failure on the behalf of her Majesty, or of any such other person as aforesaid called upon to answer or plead to such petition, to plead, answer, or demur in due time, either to such petition or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the Court or a Judge for an order that the petition may be taken as confessed; and it shall be lawful for such Court or Judge, on being satisfied that there has been such failure to plead, answer, or demur in due time, to order that such petition may be taken as confessed as against her Majesty or such other party so making default; and in case of default on the behalf of her Majesty and any other such person (if any) called upon as aforesaid to answer or plead thereto, a decree may be made by the Court, or leave may be given by the Court, on the application of the suppliant, to sign judgment in favour of the suppliant: Provided always, that such decree or judgment may afterwards be set aside by such Court or a Judge, in their or his discretion, on such terms as to them or him shall seem fit.

In case of a failure to plead, &c., on behalf of the Crown.] This enactment seems only to be declaratory of a rule which existed in suits where the king was plaintiff, thus: "If the defendant pleads and Attorney-General does not reply or

demur in reasonable time, the Court may give judgment for defendant as if plea confessed; but the Attorney-General should first be attended: Parker, 50 (Com. Dig., tit. Prerog. D. 85).

The application for the order mentioned ought, it would seem, to be made by motion after notice to the Attorney-General for the form of the judgment to be signed: see next section. It should be noticed also that in a recent case the Court thought that the judgment could only be signed in favour of the suppliant when there had been a joint default by the Crown and another person (*Kinloch* v. *Reg. and Secretary of State for India*, W. N. 1884, p. 80).

Form of judgment or decree.

IX. Upon every such petition of right the decree or judgment of the Court, whether given upon demurrer upon the pleadings or upon a default to answer or plead in time, or after hearing or verdict, or in error, shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or such other relief as the Court may think right, and such Court may give a decree or judgment that the suppliant is entitled to such relief, and upon such terms and conditions (if any) as such Court shall think just.

This section introduces a change in the old form of procedure. Hitherto the judgments upon petition of right were, if for the Crown a *nil capiat* (Tidd's Practice, 9th ed. 1076), if for the suppliant, an *amoveas manus* (see notes to next section); by this section the form is altered, and it is: "This Court doth declare that (the suppliant) is entitled to, &c." (Seton on Decrees, 59). This alteration in form corresponds with an alteration in substance, the "relief" (sect. 16) which the subject may claim (sect. 1) and the Court may adjudge him entitled to under this section, including things which could not be recovered under an *amoveas manus*. A question naturally arises how far any judgment which professes to be something more than an *amoveas manus* can be given against the Crown, consist-

ently with the proviso in sect. 7, by which the subject's remedies under the Act are restricted to those which he had before it. The answer seems to be this: that if the case is one in which he could have recovered before the Act, the mere alteration in the form of the judgment will not be considered any extension of his remedies, otherwise in cases where no remedy existed previously to the Act; which brings us back to what has been so fully discussed in the previous pages, viz., whether previous to this Act the suppliant had any remedy in a case in which any other judgment than that of *amoveas manus* was required to give him relief, which is discussed in the chapter dealing with contracts.

Forms of judgment will be found amongst the precedents appended. The question whether the form of judgment given in this section is appropriate where the suppliant recovers against a third party will be found discussed in the notes to sect. 14.

Effect of judgment of *amoveas manus*.

X. In all cases in which the judgment commonly called a judgment of *amoveas manus* has heretofore been pronounced or given upon a petition of right, a judgment that the suppliant is entitled to relief as hereinbefore provided shall be of such and the same effect as such judgment of *amoveas manus*.

This section perhaps needs a short explanation. Formerly the only judgment which was given for a successful suppliant upon a petition of right was what was called a judgment of *amoveas manus* or *ouster le maine*. "*Ouster le maine* is the judgment that is given for him that sueth a petition; for when it appeareth upon the matter discussed that the king hath no right nor title to the thing he seized then judgment shall be given in the Chancery that the kings handes be amoved" (Staunford, Prerog. cap. xxiiii. fol. 77 *b*). The form of this judgment appears to have been as follows: "Quod manus domini Regis amoveantur et possessio restituetur petenti salvo jure domini regis" (Chitty, Prerog. 345, 356); or in English: "That her Majesty's hands be amoved from the possession of the premises mentioned in the (petition), and that the said

(suppliant) be restored to his possession thereof, together with the rents and profits thereof which have not yet been answered to her Majesty, and (in case a lease has been made) that the said lease be void, &c." (Tidd, Practical Forms, ed. 1840, p. 61, § 42.) The form was a common one, being used upon reversals of outlawries, recoveries on extents, "monstrans de droit," and traverse; but it had this peculiarity, it operated to put the Crown out of possession without more: it is true that if the property in question was in the actual possession of a grantee from the Crown or the escheator, the suppliant could, in addition to this judgment, have a writ of *amoveas manus* or *ouster le maine* to put the king's officer or the grantee out of possession; "but notwithstanding that there go such writtes of *amoveas manus* both to the escheator and to the partye, yet the king is out of possession not forceing whether any of these writtes be awarded or not either to the escheator or to the partye: and thereupon the partye for whom judgment is geeven may enter forthwith into the landes and shalbee said no intruder, as appeareth in H. 10 Ed. 3, fol. 2. And the reason of it is because the judgment tyeth not the king to the deliverie of the possession but onelye to leave his hands of the possession" (Staunford, Prerog. cap. xxiiii. fol. 78 *a*). Precedents of the writs of *ouster le maine* are to be found in FitzHerbert's "New Natura Brevium," sub. tit. "Liverie" (fol. 255 *a*).

As petition of right was originally only for restitution of property, the judgment of *amoveas manus* was the only form required. The framers of this Act, however, were under the impression that more than the mere restitution of property could be obtained upon petition of right, *e.g.*, damages in contract; and recognizing that a judgment of *amoveas manus* would be inadequate, or rather inoperative, in such cases, while wishing to retain the advantages attaching thereto, they abolished the old judgment of *amoveas manus* by sect. 9, enacted a new form, and then by this section gave to the new form, when given in cases where *amoveas manus* would formerly have been given, the same force as the old judgment of *amoveas manus*. Hence, the peculiarity which we noticed with regard to the old judgment of *amoveas manus* attaches to the new form

of judgment when given for the suppliant upon petitions for the restitution of property.

There does not seem to be any authority shewing that a judgment of *amoveas manus* without more put a grantee, if actually in possession of the property claimed out of possession; but see notes to sect. 14.

Costs recoverable by the Crown and any other person party to the petition.

XI. Upon any such petition of right the Attorney-General or other person appearing on behalf of her Majesty, and every such other person as aforesaid who shall appear and plead or answer to such petition, shall be entitled respectively to recover costs against the suppliant, in the same manner, and subject to the same restrictions and discretion, and under the same rules, regulations, and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject; and for the recovery of such costs such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon judgments in personal actions or decrees, rules or orders, shall and may be prosecuted, sued out, and executed respectively by or on behalf of her Majesty and of such other person as aforesaid as shall appear and plead to such petition; and any costs recovered on behalf of her Majesty shall be paid into the Exchequer, and shall become part of the Consolidated Fund, except where such petition shall be defended on behalf of her Majesty in her private capacity, in which case such costs shall be paid to the Treasurer of her Majesty's Household, or such other person as her Majesty shall appoint to receive the same.

The suppliant to be entitled to costs against the Crown and

XII. Upon any such petition of right the suppliant shall be entitled to costs against her Majesty, and also against any other person appearing or pleading or answering to any such petition of right; in like manner, and

subject to the same rules, regulations, and provisions, restrictions and discretion, as far as they are applicable, as are or may be usually adopted or in force touching the right to recover costs in proceedings between subject and subject; and for the recovery of any such costs from any such person, other than her Majesty, appearing or pleading or answering in pursuance hereof, to any such petition of right, such and the same remedies and writs of execution as are authorised for enforcing payment of costs upon rules, orders, decrees, or judgments in personal actions between subject and subject shall and may be prosecuted, sued out, and executed on behalf of such suppliant.

other parties to the proceedings.

The two foregoing sections introduce a change, the Crown having previously neither paid nor received costs (Morgan and Wurtzburg's Costs, 336-339).

For the writs of execution to which a person is entitled to recover costs, see Rules of Supreme Court, 1883, Order 42, rules 17, 18; and Order 47, rule 3.

XIII. Whenever, upon any such petition of right, a judgment, order, or decree shall be given or made that the suppliant is entitled to relief, and there shall be no rehearing, appeal, or writ of error, or in case of an appeal or proceedings in error, a judgment, order, or decree shall have been affirmed, given, or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, any one of the judges of the Court in which such petition shall have been prosecuted shall and may, upon application in behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment or decree, rule, or order, certify to the Commissioners of her Majesty's Treasury, or to the Treasurer of her Majesty's Household, as the case may require, the tenor and purport

Decree or judgment in favour of the suppliant to be certified to the Treasury or the Treasurer of the Household in form of Schedule No. 5.

of the same, in the form in the Schedule (No. 5) to this Act annexed, or to the like effect; and such certificate may be sent to or left at the office of the Commissioners of her Majesty's Treasury, or of the Treasurer of her Majesty's Household, as the case may be.

It would seem that the suppliant has the right to choose whether he will have the certificate made and sent to the Commissioners of the Treasury or the Treasurer of her Majesty's Household, according as the petition relates in his opinion to a public or private matter within the meaning of the next section. Whether having once made his election, and being wrong, he has any right to a second certificate, does not appear; there is, however, no provision in the Act for such a contingency, and it may therefore be well to remember that "during the terme wherein any judiciall act is done, the record remaineth in the breast of the judges of the Court and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll and admitteth no alteration, averment, or proof to the contrarie" (Coke on Littleton, 260 *a.*).

Satisfaction of the judgment and costs.

XIV. It shall be lawful for the Commissioners of her Majesty's Treasury, and they are hereby required, to pay the amount of any moneys and costs as to which a judgment or decree, rule or order, shall be given or made, that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule or order, the tenor and purport shall have been so certified to them as aforesaid, out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose, provided such petition shall relate to any public matter; and in case the same shall relate to any private property of or enjoyed by her Majesty, or any contract or engagement made by or on behalf of her Majesty, or any matter affecting her

Majesty in her private capacity, a certificate in the form aforesaid may be sent to or left at the office of the Treasurer of her Majesty's Household, or such other person as her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled shall be paid to him out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose.

Public and Private Matters.] There has as yet been no definition of what respectively are public and private matters within the meaning of this section, neither does the Act say by whom the question is to be decided in the event of a difference of opinion between the Commissioners of the Treasury and the Treasurer of the Household.

By public matters are probably meant such acquisitions of property and liabilities as are made or incurred by the Crown on behalf of the public, and the profit or loss upon which goes to or is borne by the Consolidated Fund. For instance, where through intestacy and failure of heirs any property reverts to the Crown, the Crown personally gets no benefit (*a*), but the proceeds thereof are applied in the public service (see *In re Gosman*, L. R. 15 Ch. D. 67, at p. 73; 49 L. J. Ch. 590, at p. 592; 42 L. T. 804, at p. 805; 29 W. R. 14, at p. 15.). Again, where contracts are entered into with manufacturers for the supply of articles to be applied to the purposes of the nation, payments in respect thereof are of course borne by the nation and not by the Crown; petitions therefore brought in both such cases would be said to relate to public matters.

The private property of the Crown would seem to consist of all such lands and goods as are owned by the Sovereign in his or her individual capacity, and not *jure coronæ*; and the Sovereign would probably be held to have contracted and engaged in a "private capacity" in reference to any matter the expense of which usually fell upon the Civil List, or his or her own private income.

(*a*) There appears to be an exception to this rule with regard to property situate in the Duchy of Lancaster.

It is curious to notice that the Act does not appear to provide for any satisfaction of judgment in a case where the land claimed is in the possession of a third party who has been brought in to defend under sect. 5.

Cases for the restitution of property are those in which a judgment of *amoveas manus* used at common law to be given; any judgment, therefore, given in such a case under this section "that the suppliant is entitled to restitution of the property claimed" would have in virtue of sect. 10 the effect of an *amoveas manus*. The effect of such a judgment is, as we have seen (see notes to sect. 10), to "amove the hands of the Crown or its officers;" but if their hands are not on, as admittedly in such a case they are not, then it is difficult to see what effect it can have, as there is no authority for saying that such a judgment ever had the effect of amoving anyone else's.

At the common law in such a case the judgment was satisfied by the issue of a writ of *ouster le maine* to the king's patentees, by force of which they were put out of and the suppliant into possession, as appears from Staunford, who says: "When the issue is found for the partye they of the king's bench shall give judgment and award an *ouster le maine* without suing for the same in the Chancery. And note that sometymes there goeth an *ouster le maine* as well to the king's patentee as to the escheator, and that is where the king hath granted that he seized to any other" (Prerog., cap. xxiv. fol. 77 *b*, 78), though "the king is out of possession as soon as judgment is given in the Chancery" (*ibid.*).

The statute makes no provision for any such satisfaction (sect. 14), and in addition does not seem to entitle the suppliant to issue a writ of possession, which would appear to be the appropriate remedy (see Rules of Supreme Court, 1883, Order 47, rules 1, 3); since the existing practice with relation to writs of execution does not seem incorporated into this Act (see sect. 7) except for payment of costs (see sect. 12).

As one of the parties in a recent case after search failed to find precedent of a writ of *amoveas manus* (*per* Sir Roundell Palmer, *arguendo* in *Kirk* v. *Reg.*, L. R. 14 Eq. 558, at p. 566), the suppliant may have some further difficulty even should he be entitled to issue it.

XV. It shall be lawful for the judges of the said Courts of Law and Equity respectively, or any three or more of the judges of the Court of Chancery, of whom the Lord Chancellor shall be one, and for any eight or more of the judges of the Courts of Common Law, of whom the chiefs of each of the said Courts shall be three, from time to time to make all such general rules and orders in their said respective Courts of Law and Equity, for regulating the pleading and practice on such petitions of right, and for the effectual execution of this Act and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the several matters herein contained, and the performance thereof, and for the government and conduct of the officers of their respective Courts in and relating to the distribution and performance of the duties and business to be done or performed in execution of this Act, as such judges may think fit, reasonable, necessary, or proper; and to frame such writs and forms of proceedings as to them may seem expedient for the purposes aforesaid; and all such rules, orders, or regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making of the same, or if Parliament be not sitting then within five days after the next meeting thereof; and no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule, order, or regulation so made shall from and after such time aforesaid be binding and obligatory on the said Courts, and on any Courts of Error or Appeal into which any judgments or decrees of the said Courts shall be carried by any writ of error or appeal, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament: Pro-

Power to judges to make rules and regulations, &c.

vided always, that it shall be lawful for the Queen's most excellent Majesty, by any proclamation inserted in the *London Gazette*, or for either of the Houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules, orders, or regulations; and in such case the whole, or such part thereof as shall be so suspended, shall not be binding and obligatory on the said Courts.

Upon the 1st of February, 1862, an order was issued by the Court of Chancery under this section, for the regulation of proceedings in Chancery under this Act; this order is as follows:—

ORDER, 1ST FEBRUARY, 1862.

Petitions of Right.

1. Upon her Majesty's fiat being obtained to any petition of right presented in pursuance of the said Act and intituled in the Court of Chancery, such petition, with the fiat thereon,

Petition to be filed.

together with a printed copy of such petition and fiat (if the petition is in writing) shall be filed at the office of the Clerks of Records and Writs (*b*).

Marked with name of judge.

2. Every such petition, or the printed copy thereof, so filed shall be marked with the words "Lord Chancellor" or "Master of the Rolls," and if with the words "Lord Chancellor," then also with the title of the Vice-Chancellor before whom it is intended to be prosecuted.

Printed and stamped copies for service.

3. Every copy of a petition of right left at the office of the Solicitor of the Treasury in pursuance of the said Act, and every copy of a petition of right served upon or left at the last or usual or last known place of abode of any person under the provisions of that Act, shall be a printed copy, sealed with the seal of the Office of the Clerks of Records and Writs, in the same manner as copies of bills are now sealed.

(*b*) The petition is now filed at the Central Office; the Record and Writ Clerks being abolished: see Jud. (Officers) Act, 1879: R. S. C. Order LXI.

And the leaving or serving of any copy not printed or not sealed with the office seal shall be of no effect for any of the purposes of the said Act.

Interrogatories for examination of respondents.

4. A suppliant in any petition under the said Act desiring to file interrogatories for the examination of any person or persons who may be required to plead or answer thereto (other than her Majesty's Attorney-General), shall file such interrogatories at the same time as such petition. And a copy examined and marked by the Clerks of Records and Writs of the interrogatories which any respondent is required to answer shall be served upon such respondent, together with a copy of the petition.

Right to petition *in formâ pauperis*.

5. Any person who might be admitted to prosecute a suit in this Court *in formâ pauperis*, may be admitted to prosecute *in formâ pauperis* a petition of right intituled in this Court. And any person who might, if a defendant to an ordinary suit in this Court have been admitted to defend *in formâ pauperis* may be admitted to make his defence *in formâ pauperis* to any petition of right instituted in this Court, which he may be required to plead or answer to. But no person shall be admitted to prosecute any petition *in formâ pauperis* without a certificate of counsel that he conceives the case to be proper for relief in this Court.

As to suing *in formâ pauperis*, *see* Order XVI., rules 22–31.

Rules as to petitioning *in formâ pauperis*.

6. The same orders and rules shall apply with regard to any person admitted to sue or defend *in formâ pauperis* under these orders, as are applicable with regard to paupers in suits between subject and subject.

Practice in reference to suits shall apply to proceedings by petition of right.

7. So far as the same may be applicable, and except in so far as may be inconsistent with the said Act, and with the preceding orders, the general orders from time to time in force as to proceedings in suits in this Court, and the practice and course of proceeding in this Court in reference to such suits, shall be applicable and apply and extend to proceedings in this Court in petitions under the said Act, which are, for the purpose of this order, to be considered as bills.

Duties and fees of officers of the Court.

8. The duties which under the said Act and the said orders may be required to be performed by officers of this Court

shall be performed by the officers respectively who perform duties of a similar nature in suits in this Court between subject and subject. And the fees and allowances payable to all officers and solicitors of this Court, in respect of matters under the said Act, shall be such fees and allowances as, by the practice of the Court and the general orders from time to time in force, they are entitled to take and charge for similar proceedings in cases between subject and subject.

This order has not been repealed by the Supreme Court Rules, 1883 (Daniel's Chancery Forms, p. 683), but the practice thereunder has been modified, as stated in the notes to the rules, in accordance with the changes introduced thereby.

This section was repealed, before anything had been done under it on the common law side, by the Statute Law and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59, s. 3 and schedule), and by sect. 6 thereof it was enacted that "The enactments relating to the making of rules of Court contained in the Supreme Court of Judicature Act, 1875, and the Acts amending it, shall extend and apply to all matters with respect to which rules of procedure or general orders might have been made under any enactments repealed by this Act, and to all proceedings by or against the Crown." That is to say, that the Supreme Court's power of making rules of practice in actions is extended to suits by petition of right. The Court has not, however, as yet exercised this power, and therefore the existing practice is under sect. 7 of this Act.

Interpretation of terms.

XVI. In the construction of this Act the words "her Majesty" shall extend to and include her Majesty's successors; and the words "Lord High Chancellor" and "Lord Chancellor" respectively shall mean and include Keeper of the Great Seal and Commissioners for executing the office of Lord Chancellor or Keeper of the Great Seal; the word "Court" shall be understood to mean any one of the superior Courts of Common Law or Equity at Westminster in which any such petition is presented; the word "relief" shall comprehend every species of relief claimed or prayed for in any such petition of right,

whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise; and the word "Judge" shall be understood to mean a Judge or Baron of any of the said Courts respectively; and wherever in this Act, in describing or referring to any person, party, or thing, any word importing the singular number or masculine or feminine gender is used, the same shall be understood to include and be applicable to several persons and parties as well as one person or party, and to females as well as males, and males as well as females, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

Short title.

XVII. In citing this Act in any instrument, document, or proceeding it shall be sufficient to use the expression "The Petitions of Right Act, 1860."

Nothing to prevent suppliant proceeding as before.

XVIII. Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of this Act.

SCHEDULE referred to in the foregoing Act.

NOTE.—In addition to the statutory forms various other ones will be found included in this Schedule, which latter are lettered, the former numbered.

Petition.

No. 1. Formal parts of petition.

In the High Court of Justice.
Queen's Bench Division [*or*, Chancery Division (*name of judge*)].
To the Queen's Most Excellent Majesty.

The humble petition of *A.B.*, of , by his attorney, *E.F.*, of , sheweth that [*state the facts*].

Conclusion.

Your Suppliant therefore humbly prays that, &c.

Dated the day of , A.D.

(Signed) *A.B.*
or C.D., Counsel for *A.B.*
or E.F., Solicitor for *A.B.*

Sheweth :—

A. Precedent of petition upon a Government contract.

1. That in the year 18— Your Majesty's Secretary of State for [*state department*] directed that tenders for the construction of certain works [*describe them*] should be sent to the [*state which*] Office by persons desirous of contracting for the building of the said works.
2. That your suppliant did send a tender for the construction of the said works: which tender was in the following words [*set out tender*].
3. That your suppliant's said tender was accepted by Your Majesty's said Secretary by letter of which the following is a copy [*set out letter*].
4. That the contract referred to in the said tender was entered into, and the terms thereof material to the present purpose are as follows [*setting them out*].
5. The said contract was effected by an ["*agreement*" *or* "*indenture,*"*as the case may be, giving particulars thereof.*]
6. That many and large additional works within the meaning of the contract were duly ordered to be done and were done by your suppliant, amounting to a large sum, to wit, £ , whereby he became entitled to weeks' extension of the time fixed by the contract for the completion of the works.
7. That the said works, with the said additional works, were completed and handed over perfectly complete to [*state to whom handed over*], in accordance with the specification and contract, upon the day of , that is, weeks previous to the time specified as aforesaid for the completion of the contract.
8. That your suppliant claims to be entitled to have payment made to him, according to the said contract and agreement, of the sum of £ (after giving credit for all moneys paid or advanced on account and for all allowances and deductions) for and in respect of the completion by him of the said works, and of the said additional works.

Your suppliant therefore prays payment of the same.

For another precedent of a petition upon a contract, *see Thomas* v.

The Queen, L. R. 10 Q. B. 31; and for a petition for return of probate duty, *Executors of Percival* v. *The Queen*, 33 L. J. Ex. 289.

Your suppliant therefore humbly prays that Your Majesty would be graciously pleased to direct this petition to be indorsed with Your Majesty's fiat "Let right be done." B. Form of prayer to petition.

Petition of Right of A.B. No. 2.

The suppliant prays for a plea or answer on behalf of Her Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed. Indorsement for answer, etc., by Crown.

Dated the day of , 18 .

C.D., of (*address*).
[Agent for *E.F.*, of (*address*).]
Suppliant's solicitor.

Petition of Right of A.B. No. 3.

To *H.*, of .

You are hereby required to appear to the within petition, in the High Court of Justice, Queen's Bench Division [*or*, Chancery Division (*adding name of judge*)], within eight days, and to plead or answer thereto within fourteen after the date hereof. Indorsement for service on other parties under sect. 5.

Take notice, that if you fail to appear or plead or answer in due time, the said petition may, as against you, be ordered to be taken as confessed.

Dated the day of , 18 .

And conclude as in No. 2.

In the High Court of Justice.

Queen's Bench Division [*or*, Chancery Division (*adding name of judge*)].

Petition of Right. No. 4.

A.B., Suppliant,
v.
The Queen.

Præcipe for appearance.

H., of (*address*), appears in person [*or*, *H. G.*, of (*address*), solicitor for *H.*, appears for him].

Entered the day of , 18 .

C. Summons for extension of time for pleading. Q. B. D.

In the High Court of Justice. B. No. 188 .
Queen's Bench Division.

Petition of Right.

A.B., Suppliant,
v.
The Queen.

Let all parties attend the Judge (*a*) in Chambers on [Tues] day the day of , 188 , at o'clock in the noon on the hearing of an application on behalf of [*H., or, as the case may be*], that he may have one month's further time to plead or answer to the petition of right of the abovenamed *A.B.*, and that the costs of this application may be costs in the cause.

Dated the day of , 188 .

This summons was taken out by of , solicitor to [*H., or, as the case may be*].

To [*insert name and address of party to whom directed.*]

(*a*) See definition of Court and Judge, sect. 16 of the Act.

D. The same. Chan. Div.

In the High Court of Justice. B. No. , 188 .
Chancery Division.
(*Name of Judge.*)

(*Title as above.*)

Let all parties attend my Chambers in the Royal Courts of Justice, Strand, London, on the hearing, &c. [*as above*].

[Joseph W. Chitty, J.]

And conclude as above.

E. Notice of motion that petition may be taken as confessed (sect. 8). Q. B. D.

In the High Court of Justice. B. No. , 188 .
Queen's Bench Division.

A.B., Suppliant,
v.
The Queen.

Take notice that the Court will be moved on [Tues] day the day of next at o'clock of the noon, or as soon thereafter as counsel can be heard on behalf of the suppliant, that the petition of right of the above-named may be taken as confessed as against Her Majesty [*or, as the case may be*].

Dated this day of , 18 .

(*Add name and address of solicitor or party giving this notice.*)

To (*insert names of the solicitors or parties to whom this notice is given*).

F.
The same. Chan. Div.

To adapt the foregoing form to Chancery Division alter the title by changing "Queen's Bench Division" to "Chancery Division" (adding name of judge), and the body of the notice as follows: "Take notice that this Court will be moved before Mr. Justice [*insert name of judge*]" and continue as above.

G.
Answer or plea of the Crown.

In the High Court of Justice. B. No. 188 .
Queen's Bench Division [*or*, Chancery Division, *adding name of judge*].

Petition of Right.

A.B., Suppliant,
v.
The Queen.

Answer and Plea.

By Her Majesty's Attorney-General for and on behalf of Our Lady the Queen, delivered this day of , 18 , by Messrs. *H. & Co.*, of , as agents for the solicitor for the affairs of Her Majesty's Treasury.

Sir *H. J.*, Knight, Her Majesty's Attorney-General, on behalf of Our said Lady the Queen gives the Court here to understand and be informed as follows:—

1. No such, *&c.*
2. In the year, *&c.*
3. The said Attorney-General, on behalf of Her Majesty, further gives the Court to understand and be informed that save as aforesaid the several averments and statements contained in the said Petition of Right are not nor is any of them true in fact.

H.
Judgment or order on a petition of right in the Q. B. D. after trial by jury.

In the High Court of Justice. B. No. 18 .
Queen's Bench Division.

Petition of Right.

A.B., Suppliant,
v.
The Queen.

(*Date.*)

This petition of right having, upon Her Majesty's Command that right be done, on the and th November, 18 (*or, as the date may be*), been tried before the Honourable Mr. Justice (*insert name*) with a special jury of the county of (*insert name of county*) and the jury having found [*state findings as in officer's certificate*] and

the said Mr. Justice (*insert name*) having ordered that judgment be entered for the suppliant with costs [*or, as the case may be*]. Therefore it is adjudged that the suppliant [*or, as the case may be*] is entitled to [*state the "relief" to which the suppliant or other person is entitled*]. Tax the costs of the suppliant of the said petition, and let the same when taxed be paid to the suppliant in the manner directed by the Act of Parliament 23 & 24 Vict. c. 34.

I. Judgment or order on petition of right, after trial by judge without a jury.

[*Heading as in Form H.; if in Chancery Division, alter "Queen's Bench Division" to "Chancery Division," and add the name of the judge.*]

This Petition of Right coming on this day of , 18 , to be argued, upon Her Majestys's command that right be done, in the presence of counsel for the suppliant and for Her Majesty's Attorney-General, and upon reading [*enter evidence*] and upon hearing what was alleged by counsel for the suppliant and for Her Majesty's Attorney-General, this Court doth adjudge that, *&c.*, is entitled to, *&c.* Tax the costs, *&c.* [*conclude as above*].

NOTE.—See *Northam Bridge Co.* v. *The Queen*, *supra*, p. 94, for judgment for the Crown upon demurrer, and *James* v. *The Queen*, V.-C. Malins, 14 June, 1876, A. 1188, and S.C. V.-C. Malins, 4th February, 1874, A. 338, 17 Eq. 502, where the demurrer of the Attorney-General was overruled with costs; where relief was refused and costs given to the Crown: see *Re Brain*, V.-C. Malins, 1 July, 1874; A. 1770; 18 Eq. 389.

No. 5. Certificate of a judge of the Court of the tenor and purport of the judgment or decree.

To the Commissioners of Her Majesty's Treasury [*or*, the Treasurer of Her Majesty's Household].

Petition of Right of *A.B.*, in the High Court of Justice, Queen's Bench Division [*or*, Chancery Division].

I humbly certify, that on the day of , A.D. , it was by the said Queen's Bench Division [*or*, Chancery Division] adjudged [*or*, decreed, *or*, ordered] that the above-named suppliant was entitled to, *&c.*

(*Judge's signature.*)

Dated the day of , 18 .

APPENDIX A.

RETURN of every PETITION OF RIGHT which, up to the date of the return (*a*), has been presented to and fiated by Her Majesty, under the Act 23 & 24 Vict. c. 34, showing in each Petition,—(1.) The department to which the same has been referred for defence; (2.) The subject-matter thereof, and the sum of money (if any) claimed thereby; (3.) The decree or judgment (if any) pronounced, and the amount of money and costs (if any) paid or received by the Crown thereunder.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition, and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
ADMIRALTY . .	Scott	Claim under contract for supply of compressed hay, for rejections, &c.	Verdict for the Crown. No costs recovered. Suppliant dead.
	John Clare, junior . . .	£500,000 claim for alleged infringement of patent in the construction of iron ships.	Verdict for the Crown on all issues. No moneys paid or received by Crown.
	Peter Rolt	Contract for supply of Moulmein teak; rejections.	Compromised; £155, and £242 6*s.* 8*d.* costs.
	Tobins	£10,000 claimed for seizure and destruction of the "Britannia" by H. M. S. "Espoir," charged with being engaged in the slave trade.	Decision in favour of Admiralty on all points raised by demurrer. Admiralty ultimately paid £1000 to suppliants.
	Seymour, Peacock, & Co. .	£1492 7*s.* 7*d.*, claim for alleged breach of contract for supply of coals to Her Majesty's vessels at Valparaiso.	Verdict for suppliants. Crown paid £650 to suppliants, and £181 12*s.* 4*d.* for costs.
	Duncan, trading as "Smith, Sundius & Co.," Brenda.	£2500 question under charter-party.	Compromised. Crown paid £1500, and £50 7*s.* 10*d.* costs.

(*a*) 1876.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
ADMIRALTY—*continued.*	Feather	£10,000, alleged infringement of patent in construction of hull of "Enterprise."	Judgment for the Crown.
	Baker	£500, contract for supply of meat to Chatham; rejections.	Compromised; £210, and costs £26 4*s.* 8*d.*
	Davies	£4228 4*s.*, claim for alleged services to Political Agent at Aden in the receipt and issue of coals (Abyssinian Expedition).	Compromised by payment of £2500.
	Davis	To recover prize money, salvage, &c., assigned to him; forfeited by desertion.	Suppliant has died; matter not proceeded with.
	Boult.	£28,063, claim in respect of alterations made in the three steamships, "The Golden Fleece," "The Queen of the South," and "The Mauritius" (Abyssinian Expedition).	Verdict for the Crown. Notice of appeal served.
	Palmer	£14,072 15*s.* 3*d.*, claim for extras to "Jumna."	Abandoned since 1872.
	Monck	£1000, contract, fresh beef, Portsmouth.	Settled at £850, including costs.
	Tucker	£565, and interest. Claim for decorations of pavilion at Portsmouth Yard on reception of the Shah.	Settled claim and costs for £565.

CUSTOMS . . .	Mary Ann Murray . . .	Claiming arrears of pension, £300, since the month of April, 1849, of £15 per annum.	Settled by amicable arrangement; six years' arrears paid, and pension to continue. Costs £9 9*s*.
GENERAL POST OFFICE . . .	Royal Mail Steam Packet Company.	Contracts of Company for conveyance of West India, Brazil, and River Plate mails, entered into with the Admiralty.	Judgment for suppliant for £17,943 5*s*. 3*d*., and £184 12*s*. 6*d*. costs.
	Joseph George Churchward.	Contract for conveyance of mails between Dover and Calais and Dover and Ostend.	Judgment for Crown. Costs taxed at £135; payment not pressed.
INLAND REVENUE OFFICE .	Executors of Daniel Percival, deceased.	Return of Probate Duty, £150	Judgment for suppliants for £150, and £94 19*s*. costs.
	Executors of Robert Cobbold Perry, deceased.	Return of Probate Duty, £750	Judgment for Crown for £750, and £66 11*s*. costs.
	Edward Floyd De Lancey.	Return of Legacy Duty	Judgment for Crown for £647 12*s*. 6*d*., and £67 16*s*. 6*d*, costs in Exchequer, and £64 11*s*. costs in Exchequer Chamber.
TREASURY . .	James Mangen Holmes and others.	The object of the Petition was to obtain the restoration to the suppliants of so much of the land situate within or near the city of Ottawa, late Bytown, in the province of Upper Canada, in North America, taken by Her Majesty's Ordnance Department from the suppliants' predecessors in title, for the purpose of the Rideau Canal Act, as was not used for that purpose. No specific sum of money claimed.	The Crown demurred to the Petition of Right, and the demurrer was argued before Vice-Chancellor Wood, on 19th November, 1861, and was allowed. Costs of the Crown were taxed at £94 14*s*. 8*d*., which were received by the Crown.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
TREASURY—*contd.*	Henry Wollaston Blake and others, trading under the name and style of James Watt & Co.	The suppliants alleged that by certain articles of agreement, dated 3rd September, 1860, it was agreed between Thomas Graham, the Master of the Mint, for himself and his successors in office of the first part, and the said suppliants of the other part, that the said suppliants should coin 1720 tons of copper money upon certain terms in the said agreement set out, and the suppliants accordingly made all necessary arrangements for carrying out the said agreement, and the coinage in fact proceeded until the 26th September, 1861, when the Master of the Mint caused the dies to be removed and discontinued the work, and the suppliants alleged that they incurred a loss of £300, which sum they claimed.	The petition was never proceeded with.
	James Gardiner and another.	In May, 1858, an agreement was entered into between the Home Secretary and the suppliants, whereby it was agreed that the suppliants should be employed to measure the works and make up the accounts connected with the erection of some new buildings at Woking and Broadmoor, for a commission of 1¼ per cent. upon the amount of the works; and the suppliants aver that, although they measured and made up the accounts with reference to some of the works, they were not employed to do so for the whole of the works, and they claimed the sum of £562 8*s.* 6*d.*	This petition was referred to the arbitration of the Hon. G. Denman (now Mr. Justice Denman), who made an award in favour of the suppliants for £362 8*s.* 6*d.* and costs, which were taxed at £116 10*s.* 7*d.*, and paid by the Crown.

George Myers and others .	The suppliants on the 16th July, 1858, contracted with the Home Secretary to execute certain works at the Broadmoor Criminal Lunatic Asylum, and they aver by their petition that it was agreed that they should do the whole of such works, but as it turned out they were only permitted to do part of such work, and other persons were employed to do the residue, and the suppliants claimed £1804.	This Petition of Right was, by order of Mr. Justice Mellor, dated 2nd June, 1868, referred to arbitration, the arbitrator being Mr. Watkin Williams, but although the time for publishing the award has several times been enlarged, the arbitration has never taken place.
Arthur Bushe	The suppliant was the prothonotary of the Court of King's Bench in Ireland, with a salary of £1384 12*s.* 3*d.*; and by 7 & 8 Vict. c. 107, his office was abolished, and he was appointed to the new office, by the same Act created, of Master of the Queen's Bench, with a salary of £1000, and in addition he was to be allowed the annual sum of £384 12*s.* 3*d.* to make up the salary which he received as prothonotary. The salary of £1000 as Master, was subsequently, in 1857, increased to £1200, the said pension of £384 12*s.* 3*d.* still being paid. By the Act 30 & 31 Vict. c. 129, all the offices in the said courts were abolished except those of Master and Clerks of Rules; and by 38th section of that Act it was provided that by way of compensation for the additional duties thereby imposed on the Master, then provided their salaries and emoluments should not amount in the whole to the yearly sum of £1400, they should be made up to that sum. The said sum of £384 12*s.* 3*d.* was taken into account in Master Bushe's case; and his emoluments, including that sum, exceeding £1400, he was not granted the additional salary; he contended that the said sum of £384 12*s.* 3*d.* ought not to be taken into account, and he claimed, by his petition, £150, being the balance due to him.	A special case was, by consent of all parties, stated for the opinion of the Court. This was argued on 28th May, 1869, when judgment was given for the suppliant. No costs were paid by the Crown.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
TREASURY—*contd.*	William Rowe Jolley . .	The petition was presented by the suppliant, as he alleged, as the executor of John Tooker Spry Jolley, deceased, and for the sole benefit of the estate of the said deceased. The said John Tooker Spry Jolley was, on the 3rd August, 1867, appointed surgeon-superintendent to the emigrant ship "Adamant," which was employed carrying coolies from Calcutta to the West Indies, for which he was to be paid *pro ratâ* on the number of coolies to be carried. For this purpose he left England for Calcutta, but on his arrival there he was informed, as the petition alleged, that he could not proceed with the "Adamant," and he was accordingly superseded and another surgeon appointed. He was afterwards, however, appointed to the ship "Harkaway," employed in the same trade, but carrying a far less number of coolies. The suppliant claimed £300 for compensation.	The Crown pleaded and demurred to the petition, and pleas and demurrer were delivered. The suppliant's solicitors then endeavoured to effect a compromise, which the Crown declined, but intimated that they would not press for costs, and so the matter dropped.
	George William Betts . .	The suppliant avers that on condition of his agreeing to supply Portland Convict Prison with all articles of certain description which should be required for twelve months from 1st April, 1868, to 31st March, 1869, for carpenters' work at certain prices and on certain conditions, the Directors of Convict Prisons agreed to purchase from the suppliant all the said articles which should be required for the said term for the said carpenters' work, but the suppliant states that all the said articles were not purchased from him, but some were purchased from other persons, and the suppliant claimed £500.	The petition was referred to arbitration, the arbitrator being Mr. Macnamara, who awarded the suppliant £150 damages, and costs to be taxed, which amounted to £103 6s., and were paid by the Crown.

Henry Dunning Macleod .	Mr. Macleod was one of the draftsmen employed by the Law Digest Commission to prepare a specimen digest, his subject being Bills of Exchange. He was employed 16th June, 1868, to the 16th March, 1870, and received a salary at the rate, first, of £500, and afterwards of £750 per annum, payable quarterly, and he received in all £875. On the said 16th March, 1870, the Commissioners presented a final Report to Her Majesty, in which they recommended a plan for carrying out the work of constructing a digest. The Commission was consequently dissolved, and Mr. Macleod's employment ceased. The suppliant contended by his petition that the £875 so paid to him was only on account, and he claimed £7000 for payment for his labour, and £5000 by reason of the sudden cessation thereof, total £12,000.	The petition was, by consent, referred to arbitration, the arbitrator being Mr. Denman, Q.C. (now Mr. Justice Denman), who awarded the suppliant a lump sum of £675 and costs, which were taxed at £226 10*s.* 6*d.*, and paid by the Crown.
William Richard Fisher .	Mr. Fisher was another of the draftsmen employed by the Law Digest Commission, his subject being Mortgages. The petition, of course, is exactly similar to Mr. Macleod's petition, the solicitors being the same in both cases, only that Mr. Fisher claimed £5000 for payment for his labour, and £5000 by reason of the sudden cessation thereof, and for breach of contract; total £10,000.	On the morning of the trial it was arranged between counsel that this case should, like Mr. Macleod's, be referred to arbitration, but the matter was subsequently settled without arbitration, the Treasury agreeing to pay Mr. Fisher £1000 and costs, which were taxed at £182 12*s.*, and paid by the Crown.
James Gosman	William Brownley, of Marlborough Road, St. John's Wood, died on the 14th February, 1864, without leaving any heir-at-law or next of kin, but leaving a will dated 14th February, 1862. The testator was possessed of considerable leasehold estate, which estate was, by order of the Court (under whose directions the trusts of the will were being carried out) declared to belong to the Crown in default of next of kin. The suppliant, by his petition, claims to be	The matter is still proceeding.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
TREASURY—*contd.*	the next of kin, or one of the next of kin, of the said testator, William Brownley, as being his second cousin once removed *ex parte materna*. The suppliant claims such leasehold estate.		
	Heerjeebhoy Rustomjee .	The suppliant, a naturalised English subject, carried on business at Hong Kong, in China, from 1835 to 1856. Previous to the treaty of Nankin foreigners were permitted to trade only with certain Chinese merchants. These merchants formed themselves into a body called a cohong, one of the incidents of which was that all the members were jointly liable for the merchant debts of any member of the said cohong, and was to be recoverable in the way in the said petition described. The firm of Funcheong Hong, the suppliant alleges, were indebted to him in 38,395 dollars 68 cents., which the suppliant was proceeding to recover when war broke out between England and China. A treaty of peace was signed at Nankin on the 26th August, 1842, one of the provisions of which was that the Emperor of China should pay to Her Majesty the Queen 3,000,000 dollars as and for the amount of debts due by this cohong to British subjects. The suppliant alleges that he ought to be paid this sum of 38,395 dollars 68 cents. so received by Her Majesty the Queen from the Emperor of China.	The matter is still proceeding.
WAR OFFICE . .	John Palk and Wilmot Henry Palk.	Possession of land at Enfield Common, Middlesex.	Demurrer by the Crown allowed, with costs.
	Louisa Emily Baring and Lydia Emily Baring.	Breach of covenant in the erection of works under the Defence Act, 1860.	Settled by the purchase of the property (in respect of which the covenant was given) for £22,000.

Alfred Stump	£639 11*s.* 1*d.*, amount alleged to be due for the erection of new mess-house, Brompton Barracks, at Chatham.	Referred to arbitration; £245 17*s.* awarded, with £66 11*s.* for costs.
James Binsteed Johnson .	Claim of £200 by tenant of War Department lands at Sheerness for various injuries alleged to have been suffered by him at the hands of the War Office.	Settled by payment of £55 to suppliant; each party paying his own costs.
William Lavers	£16,567 19*s.* 10*d.*, erection of wharf wall, Woolwich Arsenal.	Referred to arbitration; £3214 16*s.* 3*d.* awarded to suppliant; each party paying own costs.
William Piper	£58,990 5*s.* 6*d.*, construction of three forts at Gosport.	Settled by payment of £11,000 on suggestion of Court; each party paying own costs.
Joseph William Branson and David Murray.	£85,877 19*s.* 11*d.*, North-Eastern Defences, Plymouth.	This and the next petition referred to arbitration; award in favour of Crown; suppliants unable to pay; £143 14*s.* 4*d.* taxed costs of award.
David Murray	£91,162 14*s.*, North Eastern Defences, Plymouth.	*See* last entry, which applies to this case.
Frederick Turner . . .	£308 2*s.* 6*d.*, regimental necessaries supplied for use of 76th Foot.	Discontinued by suppliant, with payment of costs.
George Myers	£38,070 10*s.* 3½*d.*, erection of Royal Victoria Hospital, Netley.	Settled by payment of £11,000; each party paying own costs.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition, and Sum of Money claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
WAR OFFICE—*continued.*	Robert Toomer and William Henry Toomer.	£554 4*s.* 2*d.*, for straw, bran, &c., supplied for the use of the troops at Aldershot.	Pending; but after the answer to the petition had been filed by the Crown, no further proceeding has yet been taken by the suppliant.
	George Tyrrell	£37,266 14*s.* 3*d.*, for buildings erected at Hurst Castle, under the Defence Act, 1860.	Still pending.
	John Kirk	£ , for building barracks at Garrioch, Glasgow.	Still pending.
	Lynall Thomas	Claims a reward (not fixed) and £10,400, expenses for alleged inventions of artillery.	Still pending.
	William Hills	£277 12*s.* 9*d.*, balance due on supplies of meat to the troops at Dover and Shorncliffe.	Settled by payment of £49 3*s.* 7*d.*, and £32 12*s.* 4*d.* costs to suppliant.
	Thomas Jolliffe Tufnell .	Claim for compensation for the compulsory retirement of the suppliant from the rank of Army Surgeon.	Dismissed with costs (£23 18*s.* 4*d.*), on suppliant's own application, the War Department having demurred.
	Ditto	Same claim as last, but petition filed in another division of Court.	Still pending.

	Mary Ryan	£53 5*s.* 8¾*d.*, arrears of rent of a house at Athlone, occupied by War Department.	Settled by payment of amount claimed, and costs.
	William Frederick Masters, and William Frederick Masters the younger.	£6443 5*s.*, for supply of cattle and forage to troops at Shorncliffe and other places.	£2617 paid to suppliants before, and £2020 6*s.* 4*d.* after petition served; £1062 19*s.* 8*d.* has been paid into Court. As to remaining £742 9*s.* 9*d.*, petition is still pending.
	William Higgs	£180 13*s.* 6*d.*, for building at Woolwich Arsenal.	Still pending.
OFFICE OF WOODS, &c.	James Grindell	For a declaration of the suppliant's right to have a grant made to him by the Crown of a Gale on the Highmeadow Estate, near Dean Forest, as a free miner of Dean Forest.	Not proceeded with.
	Ephraim Brain, Richard Cook, James Morris, Frederick Charles Jewsbury, and William Saddler.	That the declaration of forfeiture of the Alexandra Gale or Colliery in Dean Forest, made by Mr. Howard on the 17th July, 1871, might be declared illegal and of no effect, or if such declaration were valid, then, upon payment of the arrears of rent due in respect of the said colliery, the suppliants might be relieved from the effect of the forfeiture, and restored to the possession of the colliery; and for an injunction to restrain the grant of the gale to any other person without the consent of the suppliants.	Petition dismissed with costs; the costs of the Crown were taxed at £161 5*s.* 11*d.*, which amount was paid.

DEPARTMENT.	Name of Suppliant.	Subject-matter of Petition, and Sum of Money Claimed thereby.	Decree or Judgment (if any) Pronounced, and Amount of Money and Costs (if any) Paid or Received by Crown thereunder.
OFFICE OF WOODS, &c.—*continued.*	Stephen Adams and Henry Jordan.	For a declaration that by virtue of the suppliants' application of the 14th of March, 1846, they were entitled to have the gale of the Yorkley Iron Mine, in Dean Forest, granted to them in priority to James Davis, and all other free miners of Dean Forest, and that the gale ought to be granted to the suppliants; and for an injunction to restrain the grant being made to James Davis, or any other person, without the consent of the suppliants.	Not proceeded with.
	Alvan James and Thomas Morse (representatives of James Davis, deceased).	For a declaration that by virtue of the application of James Davis (deceased), of the 4th November, 1868, he was entitled to have the gale of the Yorkley Iron Mine (above-mentioned) granted to him, and that the gale ought accordingly to have been granted to him; that it might be declared that the gale ought now to be granted to the suppliants, in right of James Davis, upon and for the trusts of his will; and for an injunction to restrain the grant being made to any other person	Still pending.
OFFICE OF WORKS	Regent's Canal Company .	£1000. Landslip on the land of the Crown (Regent's Park), which injured the Regent's Canal Company.	Suppliants discontinued petition on payment of taxed costs: amount received by Crown, £6 4*s.*; costs incurred by Crown, and not allowed on taxation, £35 8*s.* 6*d.*

9th June, 1876.

A. K. Stephenson, Solicitor, Treasury.

APPENDIX B.

THE LAWS REGULATING PROCEEDINGS BY PETITIONS OF RIGHT IN IRELAND, SCOTLAND, AND CERTAIN COLONIES AND DEPENDENCIES.

IRELAND.

36 & 37 Vict. c. 69: "An Act to provide for proceeding on Petitions of Right in the Courts of Law and Equity in Ireland."

Preamble. Expediency of extending the English "Petitions of Right Act, 1860," to Ireland.

1. Short title. "The Petitions of Right (Ireland) Act, 1873."

2. Petition of Right may be entitled in Irish Court.

3. Provides "that every petition so entitled shall contain an averment that the subject-matter of the said petition, or a material part thereof, arose within that part of the United Kingdom of Great Britain and Ireland called Ireland, and such averment shall be deemed to be a material and necessary statement in the case of the suppliant, and a traverse of such averment shall be deemed to be a sufficient pleading in bar of the suppliant's right to relief."

4. Provisions of the "Petitions of Right Act, 1860," to apply to Ireland, "Provided that unless within twenty-eight days after Her Majesty's fiat to any petition has been obtained, a copy of such petition and fiat shall be left at the office of the Crown and Treasury Solicitor for Ireland endorsed in manner by the said Petitions of Right Act, 1860, prescribed, no further proceedings shall be taken or had upon such petition.

5. Irish Courts to make rules.

6. Forms prescribed in "Petitions of Right Act, 1860," to be used.

SCOTLAND.

20 & 21 Vict. c. 44: "An Act to regulate the Institution of Suits at the Instance of the Crown and the Public Departments in the Courts of Scotland."

Whereas doubts are entertained as to the proper instance to be employed in the institution of actions, suits, and proceedings in the

Courts of Justice in Scotland on the behalf of Her Majesty and of public departments: Be it enacted by, &c., as follows:—

Crown suits, &c., may be in the name of the Lord Advocate.

1. Every action, suit, or proceeding to be instituted in Scotland on the behalf of or against Her Majesty, her heirs and successors, or in the interest of the Crown or on the behalf of or against any public department, may be lawfully raised in the name and at the instance of or directed against Her Majesty's Advocate for the time being as acting under this Act.

With sanction of department having interest.

2. Provided always, That before instituting or defending any such action, suit, or proceeding Her Majesty's Advocate shall have the authority of Her Majesty or of the public department respectively on whose behalf or against whom such action, suit, or proceeding shall be instituted, to the institution or defence thereof.

Persons prosecuted not entitled to object to the instance.

3. Provided always, That it shall not be competent to any private party in any action, suit, or proceeding instituted as aforesaid, to challenge or impugn the instance of or the title to defend such action, suit, or proceeding, or the right or title of Her Majesty's Advocate to raise or prosecute or to defend the same upon any allegation that such authority (as aforesaid) has not been granted, or that evidence of such authority is not produced.

Meaning of "Public Department."

4. The expression "Public Department" shall include the Commissioners of Her Majesty's Treasury, the War Department, the Post Office, the Board of Inland Revenue, the Board of Customs, the Commissioners of Her Majesty's Woods and Forests, the Commissioners of Works and Public Buildings, the Committee of Her Majesty's Privy Council appointed for the consideration of matters relating to Trade and Foreign Plantations, and all the like Public Departments, bodies or boards, and all and every officer or officers, person and persons, acting on the behalf or in the interest of or entitled at the date of the passing of the Act to sue on the behalf or in the interest of any such Public Department.

BRITISH COLUMBIA.

1873. Act 19. (Consecutive number 439.)

Consolidated Statutes of British Columbia. Chapter 59.

"An Act to provide for the institution of suits against the Crown by Petition of Right and respecting Procedure in Crown Suits."

[This Act being in substance identical with the English Petitions of Right Act, 1860, it has been thought to be unnecessary to reprint it.]

BRITISH HONDURAS.

Ordinance No. 15 of 1879.

"To consolidate and amend the Laws relating to the process, practice, and mode of pleading in the Supreme Court in suits and proceedings at Common Law or in Equity, and to make provision for the execution of judgments and decrees and other matters."

Suits by or against the Government.

By private persons against Government.

332. All claims against the Government of the Colony being of the same nature as claims which may be preferred against the Crown in England, under the provisions of the Imperial Act, 23 & 24 Vict. c. 34, entitled "The Petitions of Right Act, 1860," may, with the consent of the Lieutenant-Governor, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant.

How commenced

333. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of complaint in the Supreme Court and the delivery of a copy thereof at the office of the Attorney-General.

Fiat of the Governor. Delivery of defence.

334. The Clerk of Courts shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Lieutenant-Governor in Council. In case the Lieutenant-Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court with the fiat of the Lieutenant-Governor endorsed thereon, and the Court may, on the application of the claimant, fix a time within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government, or demur to the action.

Service of documents.

335. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant shall be delivered at the office of the Attorney-General.

Judgment and proceedings thereon.

336. Whenever in any such suit a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Lieutenant-Governor, who, if the decree shall be for the payment of money, shall have power by warrant under his hand to direct the amount awarded by such decree to be paid by the treasurer, and in the case of any other decree, to take such measures as may be necessary to cause the same to be carried into effect.

Costs.

337. In all suits by or against the Government costs may be awarded in the same manner as in suits between private parties, but no personal liability shall attach to the Attorney-General in respect thereof.

CANADA.

Statutes of Canada, 39 Vict. c. 27. "An Act to make further provision for the institution of suits against the Crown by Petition of Right."

This Act is in substance the same as the Petitions of Right Act, 1860 (England). By sect. 19 it is provided that nothing in this Act shall—

(1.) Prejudice or limit otherwise than is herein provided the rights, privileges, or prerogatives of Her Majesty or her successors; or

(2.) Prevent any suppliant from proceeding as before the passing of this Act; or

(3.) Give to the subject any remedy against the Crown; (*a*) in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 & 24 Vict. c. 34; or (*b*) in any case in which either before or within two months after the presentation of the petition the claim is under the statutes in that behalf referred to arbitration by the head of the proper department, who is hereby authorized with the approval of the Governor in Council to make such reference upon any petition of right.

and by sect. 21 that the word "relief" comprehends every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporated right or a return of lands or chattels, or a payment of money, or damages, or otherwise.

GOLD COAST.

1877, No. 12. "An Ordinance to make provision relating to suits by and against the Government and as to the costs thereof."

Short title. 1. This Ordinance may be cited as "The Petitions of Right Ordinance, 1877."

2. [Claims by the Government against private parties.]

Claims by private parties against the Government. 3. All claims against the General Government of the Colony or against the Government of any settlement being of the same nature as claims which may be preferred against the Crown in England by Petition, Manifestation, or Plea of Right, may, with the consent of the Governor, be preferred in the proper Divisional Court of the Supreme Court in a suit instituted by the claimant as plaintiff against the Queen's Advocate as defendant or such other officer as the Governor may from time to time designate for that purpose.

How suit 4. The claimant shall not issue a writ of summons, but the suit

shall be commenced by the filing of a statement of claim in the Supreme Court and the delivering of a copy thereof at the office of the Queen's Advocate or other officer designated as aforesaid, and no fee shall be payable on filing or delivering such statement. commenced.

5. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor. In case the Governor shall grant his consent as aforesaid the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the claim shall be prosecuted in the Divisional Court in which the same shall have been filed, or in such other Court as the Chief Justice shall direct. Fiat of Governor.

6. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant, shall be delivered at the office of the Queen's Advocate or other officer designated as aforesaid. Service of documents.

7. Whenever in any such suit a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall by warrant under his hand direct the amount awarded by such decree to be paid, and in the case of any other decree shall take such measures as may be necessary to cause the same to be carried into effect, or in case he shall think fit he may direct that any competent appeal shall be entered and prosecuted against any decree. Judgment and proceedings thereon.

8. So far as the same may be applicable and except in so far as may be inconsistent with this Ordinance, all the powers, authorities, and provisions contained in the "Supreme Court Ordinance, 1876," or in any enactment extending or amending the same, and the practice and course of procedure of the Supreme Court of the Gold Coast Colony shall extend and apply to all suits and proceedings by or against the Government, and in all such suits costs may be awarded in the same manner as in suits between private parties. The Supreme Court ordinance incorporated.

GRENADA.

Ordinance, No. 16, 1882.

343. All claims against the Government of the Colony being of the same nature as claims which may be preferred against the Crown in England under the provisions of the Imperial Act, 23 & 24 Vict. c. 34, entitled "The Petitions of Right Act, 1860," may, with the consent of the Governor, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against "the Attorney-General" as defendant. Claims by private parties against the Government.

344. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of How commenced.

complaint in the Supreme Court, and the delivery of a copy thereof at the office of the Attorney-General.

Fiat of Governor, delivery of defence.

345. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor in Executive Council. In case the Governor shall grant his consent as aforesaid the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the Court may, on the application of the claimant, fix a time within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government or demur to the action.

Service of documents.

346. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant shall be delivered at the office of the Attorney-General.

Judgment and proceedings thereon.

347. Whenever in any such suit a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall have power by warrant under his hand to direct the amount awarded by such decree to be paid by the Colonial Treasurer, and in case of any other decree to take such measures as may be necessary to cause the same to be carried into effect.

Costs.

348. In all suits by or against the Government costs may be awarded in the same manner as in suits between private parties, but no personal liability shall attach to the Attorney-General in respect thereof.

[N.B.—As to claims of under £100 against the Government, see Ordinance No. 10, 1882, s. 30].

HONGKONG.

Ordinance No. 13 of 1873.

"An Ordinance enacted by the Governor of Hongkong with the advice of the Legislative Council thereof to consolidate and amend the Laws relating to the Process, Practice, and Mode of Pleading in the Supreme Court of the Colony, and to provide a uniform Code of Procedure at Common Law and in Equity."

Part IV., Chapter XIV., sect. 83.

Claims against the Government.

In what cases may be preferred: in what form.

1. "All claims against the Government of the Colony of the same nature as claims within the provisions of the 'Petitions of Right Act, 1860,' may with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant against the Attorney-General as defendant."

2. It shall not be necessary for the plaintiff to issue a writ of summons, but the suit shall be commenced by the filing and service of the petition upon the Crown Solicitor. To be commenced by petition.

3. The Crown Solicitor shall transmit the petition to the Government, and in case the Governor shall grant his consent as aforesaid the suit may proceed and be carried on under the ordinary procedure provided by this Code. Consent of Government: procedure thereon.

4. The petition and all other documents, notices, or proceedings which in a suit of the same nature between private parties would be required to be served upon the defendant shall be served upon the Crown Solicitor. Service of petition, &c.

5. Whenever in any such suit a decree shall be made against the Government no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Government. Proceedings on decree.

JAMAICA.

Law 39 of 1879. "The Civil Procedure Code."

Suits against the Government.

354. All claims against the Government of this Island being claims of which the subject-matter would have been cognizable by the Supreme Court of Judicature if the claim had been against a private individual may with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against "The Attorney-General" as defendant. Claims by private parties against Government.

355. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of complaint in the Supreme Court, and the delivery of a copy thereof at the office of the Attorney-General. How commenced.

356. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor in Privy Council. In case the Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the Court may on the application of the claimant fix a time, being not less than fourteen days, within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government or demur to the action. Fiat of Governor. Delivery of defence.

357. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant shall be delivered at the office of the Attorney-General. Service of documents.

358. Whenever in any such suit a decree is made against the Government no execution shall issue thereon, but a copy of such decree Judgment and pro-

ceedings thereon. under the seal of the Court shall be transmitted by the Court to the Governor, who if the decree shall be for the payment of money shall have power by warrant under his hand to direct the amount awarded by such decree to be paid by the Government, and in case of any other decree to take such measures as may be necessary to cause the same to be carried into effect.

Costs. 359. No personal liability shall attach to the Attorney-General in respect of costs awarded in any suit against the Government.

LEEWARD ISLES.

Act No. 8 of 1876.

Suits against the Government.

Claims by private parties against the Government. 368. All claims against the General Government of the Colony or against the Government of any Presidency being of the same nature as claims which may be preferred against the Crown in England under the provisions of the Imperial Act 23 & 24 Vict. c. 34, entitled the "Petitions of Right Act," 1860, may with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the "Attorney-General" as defendant.

How commenced. 369. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of complaint in the Supreme Court and the delivery of a copy thereof at the office of the Attorney-General.

Fiat of Governor. Delivery of defence. 370. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor in Council. In case the Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the Court may on the application of the claimant fix a time within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government, or demur to the action.

Service of documents. 371. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant shall be delivered at the office of the Attorney-General.

Judgment and proceedings thereon. 372. Whenever in any such suit a decree shall be made against the Government no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall have power by warrant under his hand to direct the amount awarded by such decree to be paid by the General or Local Government, as the case may be, and in the case of any other decree to take such measures as may be necessary to cause the same to be carried into effect.

373. In all suits by or against the Government costs may be awarded in the same manner as in suits between private parties, but no personal liability shall attach to the Attorney-General in respect thereof. Costs.

MANITOBA.

38 Vict. c. 12. "An Act to regulate proceedings against and by the Crown."

1. A petition of right may be presented as herein provided, in which the subject-matter thereof or of any part thereof would be cognizable by action or suit if the same were a matter of dispute between subject and subject: and such petition may be in the form or to the effect of the form hereto marked No. 1, and shall state the christian and surname and usual place of abode of the petitioner, and of his solicitor or attorney, if any, by whom the same is presented, and shall set forth with reasonable certainty the facts entitling the petitioner to relief, and shall be signed by the petitioner, his solicitor or attorney. Petition may be presented —how to be made.

2. The said petition shall be left with the Provincial Secretary, who shall forthwith submit the same for consideration to the Lieutenant Governor, who shall with all convenient dispatch endorse thereon, if he thinks the matter should be litigated, "Let right be done;" if he thinks otherwise, "Refused;" and the said petition, with the endorsement thereon as aforesaid, shall with all convenient speed be returned by the Provincial Secretary to the party leaving the same, and no fee shall be charged by the Crown in respect thereof. Petition to be left with Provincial Secretary to be submitted to Lieutenant-Governor.

3. If the petition shall be returned endorsed "Refused" no further proceedings shall be taken thereunder: but if it shall be returned "Let right be done," the said petition shall become and be the commencement of the action or suit according to the nature of the petition, which shall then proceed as an ordinary action at law or a suit in equity between subject and subject, except that the said petition shall be filed, and in an action at law form the declaration and in a suit in equity form the bill of complaint: and a copy of the petition shall be left in the office of the Provincial Secretary with the Provincial Secretary, or with some responsible person in his office in his absence, who if required to do so shall admit service thereof, on which said copy shall be endorsed in the case of an action at law "The defendant is to plead or demur within eight days otherwise judgment," and in the case of a suit in equity "the defendant is to answer or demur hereto within twenty-eight days, otherwise the complaint will be taken as confessed:" and the action or suit shall from and at the filing of the said petition with the endorsement thereon as aforesaid be styled "A. B. (the petitioner) plaintiff, and Her Majesty the Queen defendant:" and the action or suit and all proceedings therein shall in all respects except as aforesaid be the same If endorsed "refused," no proceedings.

and be governed by the same rules, principles and practice as in ordinary actions or suits between subject and subject.

Any other persons may be made defendants. Copy of the petition and endorsement to be served.

4. Any other person or persons in any way interested in the subject-matter of the petition may be made defendant or defendants along with Her Majesty at any stage of the proceedings before final judgment or decree on obtaining a judge's order for that purpose, who shall be served with a copy of the petition on which shall be made the endorsements aforesaid, and against whom in default of plea and demurrer, or answer or demurrer, judgment may be signed or the complaint may be taken *pro confesso*.

On default judgment *pro confesso*. Court shall give judgment to be to the same effect as judgment *amoveas manus*. Costs as in other cases may be enforced against any person in suit (except H.M.).

5. In any such action or suit the Court shall give such judgment and make such order or decree, with such terms and conditions as shall be consonant with the laws of this Province, and as the Court shall think just: and such judgment shall be of such and the same effect as a judgment of *amoveas manus:* and costs shall follow the same rules as in cases between subject and subject, and shall in the same manner be enforced against parties to any such actions or suits (except Her Majesty), as in ordinary cases.

6. If judgment be in favour of the plaintiff as against Her Majesty, the Court or a judge may certify to the Provincial Treasurer the tenor and purport of the same, which may be in the form or to the effect of the form hereto, No. 2, which may be sent to or left in the office with some responsible clerk for the said treasurer, and he is hereby required to pay any sums for relief, costs, or otherwise directed by the said certificate, out of any moneys in his hands for the time being not otherwise appropriated by the Act of the Legislature.

If judgment against H.M. judge to certify judgment to Provincial Treasurer or responsible clerk, who shall pay costs.

7. [Her Majesty may bring action as in ordinary suits. If costs against Her Majesty, no execution to issue.]

8. Nothing in this Act contained shall prevent any subject or Her Majesty from proceeding in any case as though this Act had not been passed.

9. The judges, or any two of them, of whom the Chief Justice shall be one, may make any rules requisite or necessary to facilitate proceedings under this Act.

FORM No. 1.

MANITOBA, CITY OF WINNIPEG, TO WIT.

In the Queen's Bench.

The day of A.D. 18

at law [or in equity *as the case may be*].

A. B., Plaintiff,

and

Her Majesty the Queen,

Defendant.

The humble petition of A. B., of , grocer, by E. F., his

attorney (if it be an action at law, or by E. F., his solicitor, if it be a suit in equity), sheweth:—

(State the facts or case as in a declaration at law, but more circumstantially, or as in a bill in equity.)

(Conclusion.)

Your petitioner therefore humbly prays (state concisely the relief asked with clearness and precision, and let it be such as legally flows from the statement of facts.)

Signed A. B.,
or C. D.,
Attorney for A. B. (in an action at law);
or E. F.,
Solicitor for A. B. (in a suit in equity).

FORM No. 2.

To the Honourable the Treasurer of Manitoba.

(Style of Court and cause.)

It is hereby certified that on the day of A.D., 18 , it was by the said Court adjudged (or decreed or ordered as the case may be), that the above-named plaintiff was entitled to, &c. (state concisely the effect of the judgment, &c.)

Dated this day of A.D. 18 .

By the Court.

C. D.
(Prothonotary or Master)
(*or* signature of Judge.)

NEWFOUNDLAND.

27 Vict. c. 8: "An Act to provide for the more easy recovery of certain Claims against the Government of this Colony.

1. Any person who may have any claim arising *ex contractu* against the Government of this colony or against any department thereof, shall prefer a petition to the Supreme Court setting forth as briefly as possible the circumstances of the claim, and praying such relief, whether legal or equitable, as he may consider himself entitled to, and such petition shall be verified by affidavit and a copy thereof shall be served upon the Attorney-General, or in his absence the Solicitor-General for the time being. To petition nature of claims.

2. The Attorney-General, or in his absence the Solicitor-General, shall within ten days after such service file an appearance and answer to the said petition in the said Court, and serve a copy of his answer on Appearance and answer of

Attorney-General.

the petitioner or his attorney, and the petitioner, should he dispute the allegations therein contained, shall file a replication to the same within four days after such answer shall have been served upon him: and should either party fail within the time aforesaid to take such steps as may be incumbent upon him to bring the case to a hearing, judgment that the matter of his petition be taken as confessed, or that the same be dismissed for want of prosecution as the case may require, may be entered by rule absolute in the first instance by the opposite party.

First taken *pro confesso*.

Proceedings on petition being taken as confessed.

3. Upon any petition being taken as confessed for the cause aforesaid, it shall be lawful for the Court to pronounce judgment therein or to refer to the consideration and report of the master any matter upon which they may deem enquiry to be necessary. The defendants in such suit shall be at liberty to attend before the master, and within four days after the master's report shall have been filed to file and serve exceptions to the same: and after all exceptions (if any) shall have been heard and determined, or upon such report of no exceptions having been taken, the Court shall give judgment in the cause according to the principles hereinafter declared with reference to contested suits.

When answer admitted.

4. When the petitioner shall admit the matter set forth in the answer of the Attorney-General or of the Solicitor-General, he shall within four days after such answer shall have been served and filed as aforesaid, set the cause down for hearing upon petition and answer.

Evidence may be taken.

5. When a replication shall have been filed any evidence that may be required shall be taken in manner now practised on the equity side of the said Court, and when all the evidence shall have been taken the cause may be set down for hearing by either party upon petition, answer, and evidence.

Judgment to be certified to the Colonial Secretary and carried into effect by Government.

6. At or after the hearing of the cause, judgment either legal or equitable according to the character of the relief sought shall be given therein: and upon such judgment being certified to the Colonial Secretary by the clerk of the Court, the same shall be carried into effect by the Government, either by payment of the amount thereof out of the general revenue of the colony or by the performance of any other act that may be therein directed, should such judgment be to any effect other than the payment of money: or judgment for the payment of money may be enforced by process of execution against the moneys, lands, and effects of the Local Government as in ordinary cases between party and party.

Court may order rehearing.

7. It shall be lawful for the said Court if it shall think fit upon the petition of either party to be filed within four days after judgment shall have been given to order that the said cause shall be reheard, and at or after such rehearing it shall be lawful for the said Court to confirm, alter, amend, or reverse its former judgment as the merits of the case may require.

8. When any such petition shall be dismissed or judgment in the matter thereof be given against the petitioner, the attorney of the defendants shall tax and be entitled to from the petitioner the same costs as are allowed in an equity suit between private parties, and shall have the like remedy for the recovery thereof: and where judgment shall be given for the petitioner he shall be entitled to tax and recover costs after the same scale from the Government in manner provided with respect to judgments for the payment of money: Provided that nothing herein contained shall control the discretion of the Court in giving or withholding costs according to the ordinary rules of equity where the relief sought is of an equitable character. Provisions as to costs.

9. It shall be lawful for either party in any such suit to appeal to the Queen in Council in the same manner as in ordinary cases between party and party under the Royal Charter. Appeal to Queen in Council.

And

46 Vict. c. 15: "An Act to facilitate the trial of questions relating to Crown grants, licenses, and leases, and for other purposes."

1. The term "Crown grant" in this Act shall include any grant, lease, or license of occupation absolute, limited or conditional, of or relating to any of the Crown or public lands of the Colony, or any license to search, lease, or grant of any mining or other rights or interest of or in any lands in this Colony granted by or issuing from Her Majesty, the Government, or any department thereof. Interpretation of the term Crown grant.

2. Any person having or claiming to have an interest in any lands or tenements in this Colony, or any rights or privileges arising therefrom or appointment thereto, which are or are claimed to be held, conveyed or otherwise affected by any Crown grant, who shall claim that such Crown grant is void or voidable, or has been or ought to be forfeited, or that any defect, irregularity, omission, or error of any kind has occurred in or relating to such grant, or the right or title of the Crown to make such grant, or the right or title of the granter or holder of such grant to obtain or retain the same, or that any other act, matter or thing has been done or suffered whereby or by reason whereof such grant, or any part, provision, or condition thereof, should be set aside, declared void, struck out, expunged, altered, or amended, or any clause, condition, or provision should be added, or the name of any grantee or other party thereto added, struck out, or altered, or who shall claim any other relief legal or equitable against or in relation to such grant may prefer a petition to the Supreme Court setting forth as briefly as possible the nature of his claim, the facts or circumstances or other grounds upon which he makes the said claim or prays the said relief, and as nearly as may be the nature of the relief which he prays. And such petition shall be verified by affidavit. Trial of question relating to Crown grants to be had on petition to Supreme Court.

3. A copy of said petition shall in all cases be served upon the Service of copy of petition.

Attorney-General, or in his absence the Solicitor-General, on behalf of the Government.

All persons interested to be parties to proceedings.

4. All persons whose interests are or may be or are sought to be in any way affected by the order or decree of the Court, or other relief sought for by the said petition, shall be made parties to the proceedings under the said petition or be served with a copy thereof in the same manner and subject to the same directions and consequences as in a suit on the equity side of the Supreme Court in relation to the subject-matter of the said petition.

Proceedings to be as on equity side of Court.

5. The proceedings upon such petition shall be in all respects as nearly as may be in accordance with the practice on the equity side of the Supreme Court.

Court to make decree as in other cases.

6. The Supreme Court and the judges thereof shall at any stage of the proceedings under such petition or upon the hearing of such petition have the power to make, pronounce, and grant such decree, order, or judgment, or to grant such other relief legal or equitable in relation to the subject-matter of the said petition as might be given, pronounced, or granted in, under or by virtue of any other suit, action, or other proceeding in relation to any deed, conveyance, contract, or document other than a Crown grant, and to make such order as to costs as to the Court or judge shall seem meet, which costs shall be taxed in accordance with the scale on the equity side of the Supreme Court: Provided that in no case shall the Crown or Government be entitled to recover or be made liable to the payment of costs.

Appeal.

7. Any party to any proceeding under this Act may appeal to Her Majesty in Council in the same manner as in ordinary cases between party and party under the Royal Charter.

Saving clause.

8. The provisions of this Act shall not be held to take away or affect any action, suit, right or remedy which any persons would before the passing of this Act have been entitled to have or maintain.

Suspending clause.

9. This Act shall not come into operation till the assent of Her Majesty has been signified thereto.

NEW SOUTH WALES.

39 Vict., No. 38. "An Act to enforce Claims against the Colonial Government and to give Costs in Crown Suits."

[Reserved:—23rd March, 1876.]

1. [Repeal of Acts 20 Vict., No. 15, and 24 Vict., No. 27.]

Claimant may petition Government.

Governor may appoint nominal defendant.

2. Any person having or deeming himself to have any just claim or demand whatever against the Government of this Colony may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition, and the Governor with the advice of the Executive Council may by notification in the *Gazette* appoint any person resident in the Colony to be a nominal defendant accordingly. Provided that if within one month after presentation of

such petition no such notification be made the Colonial Treasurer for the time being shall be the nominal defendant.

3. Any such petitioner may sue such nominal defendant at law or in equity in any competent Court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject. Petitioner may sue as in ordinary cases.

4. The nominal defendant in any case under this Act or arising from the working of this Act shall not be individually liable in person or property by reason of his being such defendant. Limited liability of nominal defendant.

5. In any action or suit under this Act all necessary judgments, decrees, and orders may be given and made, and shall include every species of relief whether by way of specific performance or restitution of rights or recovery of lands or chattels or payment of money or damages. Nature of relief afforded by judgment.

6. In any action or suit by the Crown or Attorney-General on behalf of the Crown costs shall follow or may be awarded as in an ordinary case between subject and subject. Costs.

7. The Colonial Treasurer shall pay all damages and costs adjudged against any such nominal defendant or costs awarded against the Crown or Attorney-General under this Act out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the Consolidated Revenue of this Colony or thereafter voted by Parliament for that purpose, and in the event of such payment not being duly made within sixty days after demand execution may be had for the amount, and the same be levied upon any property vested in the Government of this Colony, but not upon any property real or personal vested in it on behalf of the Imperial Government as to which such last-mentioned Government has any claim or is in anywise entitled. Treasurer to pay damages awarded.

8. The judges of the Supreme Court may make rules, &c., for carrying this Act into effect. Rules of Court.

9. This Act shall be styled and may be cited as the "Claims against the Colonial Government Act." Short title.

N.B.—Upon what claims are cognisable under this Act, see *Farnell* v. *Bowman*, *Times*, 23rd June, 1887.

STRAITS SETTLEMENTS.

Ordinance No. 15 of 1876: "An Ordinance to amend the law relating to Crown suits."

Part IV.—Suits for Redress against the Crown.

18. I. And whereas it is expedient to make better provision by law for giving redress to persons having claims against the Crown in the Colony it is further enacted:

II. Any claim against the Crown founded on the use or occupation or right to use or occupation of Crown lands in the Colony, any claim arising out of the Revenue Laws or out of any contract entered into or which should have or might have been entered into on behalf of the Crown by or by the authority of the Government of the Colony which would if such claim had arisen between subject and subject be the ground of an action at law or suit in equity, and any claim against the Crown for damages or compensation arising in the Colony shall be a claim cognizable under this Ordinance.

Petition of Right.

19. [Any person having such claim may present a petition to Governor in Council—Governor in Council may fiat—Filing—Copy with request to answer to be left with Attorney-General—Petition to form a suit.]

Answer.

20. [Attorney-General to answer—May move to dismiss petition on point of law—Court may order dismissal or amendment—Form of Answers by Attorney-General.]

Subsequent Proceedings.

21. [Subsequent proceedings to be same as in ordinary suits.]

Judgment and Execution.

22. [Judgment and appeal as in ordinary suits.]

23. [No execution to issue against the Crown, but a certificate of the judgment to be given the petitioner.]

24. The amount with any costs given by the judgment, decree, or order of the Court shall be payable out of any moneys in the Treasury legally applicable thereto, or out of any moneys which may be voted by the Legislative Council for the purpose: and the Governor shall order payment accordingly, and shall also order the performance of any decree or order which may be pronounced or made in the suit by the Court.

25. [Appeal.]

TOBAGO.

Ordinance No. 4 of 1884: "To consolidate and amend the laws relating to the process, practice, and mode of pleading in the Supreme Court in suits and proceedings at common law and in equity: and to make better provision for the execution of judgments and decrees, and for other matters."

Suits against the Government.

Claims by private

343. All claims against the Government of the Colony being of the same nature as claims which may be preferred against the Crown of

England under the provisions of the Imperial Act, 23 & 24 Vict. c. 34, entitled the Petitions of Right Act, 1860, may with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant. persons against the Government.

344. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of complaint in the Supreme Court and the delivery of a copy thereof at the Chambers of the Attorney-General. Suits how commenced.

345. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor in Council. In case the Governor shall grant his consent as aforesaid the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the Court may on the application of the claimant fix a time within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government or demur to the action. Fiat of Governor. Delivery of defence.

346. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant, shall be delivered at the Chambers of the Attorney-General. Service of documents.

347. Whenever in any such suit a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree, under the seal of the Court, shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall have power, by warrant under his hand, to direct the amount awarded by such decree to be paid by the Colonial Treasurer, and in case of any other decree to take such measures as may be necessary to cause the same to be carried into effect. Judgment and proceedings thereon.

348. In all suits by or against the Government costs may be awarded in the same manner as in suits between private parties, but no personal liability shall attach to the Attorney-General in respect thereof. Costs of such suits.

TASMANIA.

23 Vict. No. 1. "An Act to give redress to persons having claims against the Crown arising in the Colony of Tasmania.

1. Any claim against Her Majesty, founded on and arising out of any contract entered into on behalf of Her Majesty, or by the authority of Her Majesty's Local Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, shall be a claim cognizable under this Act.

2. [Act to extend to claims to land and water arising before commencement thereof, and to other claims since 1st November, 1856.]

3. Any person having a claim cognizable under this Act may commence a suit against Her Majesty in the Supreme Court of Tasmania

by filing a supplication in the said Court, setting forth the particulars of such claim; and the Supreme Court is hereby empowered to hear and determine such suit in manner hereinafter provided.

4. No suit shall be commenced under this Act in respect of claims arising after the commencement of this Act, but within six years after the time at which the right to commence such suit accrued.

5. [Supplication to be in form of a declaration or bill of complaint, according as claim is legal or equitable.]

6. [Suit by supplication to be analogous to an action at law or a suit in equity, according as claim is legal or equitable.]

7. [Form and date of supplication and subsequent pleadings to be as per schedule.]

8. [Judgment appeal and costs to be as in ordinary cases between suitors.]

9. [No execution to issue against the Crown, but a certificate of judgment to be given to suppliant.]

10. On receipt of such certificate it shall be lawful for the Governor, with the advice of the Executive Council, to cause to be paid out of the general revenue such damages as may, under the authority of this Act, be assessed to or in favour of the suppliant, and also any costs which may be adjudged or awarded to him by the Court, and also to perform any decree or order which may be pronounced or made in the suit by the Court.

11. [Execution against the petitioner.]

12. [Act not to apply to settled claims.]

13. Nothing in this Act contained shall extend to any claim the compensation for which would, if granted before the commencement of this Act, have been paid from Imperial funds as distinguished from the land fund or the general revenue of this Colony.

14. [Judges to make rules.]

15. [Commencement of Act.]

16. [Short title, "The Crown Redress Act."]

WESTERN AUSTRALIA.

31 Vict. No. 7. "An Ordinance to facilitate Proceedings by Persons having Claims against the Government."

Whereas the ordinary remedy by Petition of Right is of limited operation, and is insufficient to meet all cases that may arise, and is attended with great expense and delay: Be it therefore enacted, &c.:—

Persons having claims against local

1. In all cases of dispute or difference touching any claim between any person and the Colonial Government which may have arisen or may hereafter arise within the said Colony, it shall and may be lawful for any person or persons having such disputes or differences to present

a petition to the Governor of the said Colony, setting forth the particulars of the claim of such petitioner; and such petition shall be referred by the Governor to his Executive Council, and if the said Governor shall, with the advice of his Executive Council, think fit, the said petition shall be referred to the Supreme Court of the said Colony for trial by a jury or otherwise as such Court shall, after such reference, direct: Provided always, that in case the Governor, with the advice of his Executive Council, shall certify in writing endorsed on any such petition so to be presented as aforesaid, that in his opinion the subject matter of such petition affects the royal prerogative, it shall and may be lawful for the Governor, with such advice as aforesaid, to transmit the same to Her Majesty's Principal Secretary of State for the Colonies for the signification of Her Majesty's approval or disapproval; and if such petition be returned with Her Majesty's approval, the same proceedings as are hereinbefore directed shall be taken for the trial of the matter thereof; but in case of such petition being returned without such approval, the same, together with the endorsation thereon, and the reasons assigned for withholding such approval, shall be forthwith published in the Government *Gazette*, in which case the remedy hereby provided shall not be had.

government may petition for redress.

Petition shall be referred to Supreme Court for trial.

Claims affecting the royal prerogative to be reserved.

2. At the time of such reference for trial as aforesaid the Governor, with such advice as aforesaid, shall name some person or persons to be nominal defendant in the matter of such petition, the petitioner being the plaintiff therein: Provided that nothing in this Ordinance shall be construed to extend so as to subject any such nominal defendant to any individual responsibility in person, goods, chattels, estate, or otherwise, by reason of his being such nominal defendant.

Governor to name nominal defendant.

3. [Chief Justice to make rules of practice.]

4. The parties to any such proceedings shall have the same rights, either by way of appeal, rehearing, motion for a new trial, or otherwise, as in ordinary cases at law or in equity.

Right of appeal reserved.

5. Costs of suit shall follow on either side as in ordinary cases between suitors, any law or practice to the contrary notwithstanding.

Costs.

6. It shall be lawful for the Governor, with the advice of the Executive Council, to satisfy and pay any judgment or decree recovered by any such petitioner out of any available balance of the revenue of the said Colony, and to perform any judgment or decree of the said Court in terms of such judgment or decree.

Claims to be paid out of revenue.

SAINT VINCENT.

No. 3, 3rd July, 1884. "Code of Civil Procedure Ordinance."

343. All claims against the Government of the Colony, being of the same nature as claims which may be preferred against the Crown in England under the provisions of Imperial Act 23 & 24 Vict. c. 34,

Claims by private parties against

the Government.

entitled "The Petitions of Right Act, 1860," may, with the consent of the Governor, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant.

How commenced.

344. It shall not be necessary for the claimant to issue a writ of summons, but the suit shall be commenced by the filing of a statement of complaint in the Supreme Court, and the delivering of a copy thereof at the office of the Attorney-General.

Fiat of Governor. Delivery of defence.

345. The Registrar shall forthwith transmit the statement of claim to the Colonial Secretary, and the same shall be laid before the Governor in Council. In case the Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court with the fiat of the Governor endorsed thereon, and the Court may, on the application of the claimant, fix a time within which the Attorney-General shall file and deliver a statement of defence on behalf of the Government, or demur to the action.

Service of documents.

346. All documents which in a suit of the same nature between private parties would be required to be served upon the defendant, shall be delivered at the office of the Attorney-General.

Judgment and proceedings thereon.

347. Whenever in any such suit a judgment shall be made against the Government, no execution shall issue thereon, but a copy of such judgment under the seal of the Court shall be transmitted by the Court to the Governor, who, if the judgment shall be for the payment of money, shall have power by warrant under his hand to direct the amount awarded by such judgment to be paid by the Colonial Treasurer, and in case of any other judgment to take such measures as may be necessary to cause the same to be carried into effect.

Costs.

348. In all suits by or against the Government, costs may be awarded in the same manner as in suits between private parties, but no personal liability shall attach to the Attorney-General in respect thereof.

VICTORIA.

28 Vict. c. 241. "An Act to consolidate the Law relating to the protection and recovery of Crown property and the enforcement of claims against the Crown."

Part II.—Mode of Enforcing Claims against the Crown.

Subjects enabled to sue the Crown.

20. Where any person has any claim or demand against Her Majesty which may have arisen or accrued since 4th June, 1858, or which may hereafter arise or accrue within Victoria, it shall be lawful for such person to set forth in a petition the particulars of his claim or demand as nearly as may be in the same manner as in a declaration or bill of complaint (as the case may be): and such petition shall be filed in the Supreme Court in order that such Court may proceed to hear

and determine the same as hereinafter mentioned, and the filing of such petition in the manner aforesaid shall be the commencement of the suit.

Petition to be analogous to an action at law or suit in equity.

21. In case the matter disclosed and stated in the said petition would be the ground of an action at law if the same had arisen between subject and subject, the proceedings on such petition shall be conducted in the same manner and subject as nearly as may be to the same rules of practice as an action at law; and a law officer shall, for and on behalf of Her Majesty, plead or demur to such petition within the same time after delivery to him of a copy thereof as any subject would be bound to plead or demur to a declaration; and in case the complaint disclosed and stated in the said petition would be the ground of a suit in equity if the same had arisen between subject and subject, the proceedings on such petition shall be conducted in the same manner and subject as nearly as may be to the same rules of practice as a suit in equity; and a law officer shall, for and on behalf of Her Majesty, answer, plead, or demur to such petition within the same time after delivery to him of a copy thereof as any subject would be bound to plead, answer, or demur to a bill of complaint.

Form and date of petition and proceedings.

22. All pleadings after such petition shall be respectively delivered between the petitioner and a law officer: and every such petition and pleading respectively shall and may be in the form contained in the 10th Schedule to this Act, or to the like effect: and shall be entitled of the said Court and of the day and of the month and the year when the same is filed or delivered, and shall bear no other time or date.

Judgment or decree and costs.

23. The said Court shall and may give and pronounce such and the like judgment, order, or decree in any such petition as such Court would give and pronounce in any action or suit between subject and subject, and a writ of error or appeal from any such judgment, order, or decree shall lie and be had in the same manner as from any judgment, order, or decree of the said Court in any action or suit between subject and subject; and the costs of suit shall follow on either side as in ordinary cases between other suitors, any law or practice to the contrary notwithstanding.

Execution against the Crown.

24. Except as hereinafter mentioned no execution or attachment or process in the nature thereof shall be issued out of the said Court in any such suit: but after any such judgment, order, or decree as aforesaid against the Crown shall have been given or pronounced, the proper officer of the said Court shall give to the petitioner a certificate in the form contained in the 11th Schedule to this Act or to the like effect.

Governor may pay damages and costs and perform decrees.

25. On receipt of such certificate it shall be lawful for the Governor to cause to be paid out of the consolidated revenue such damages as may, under the authority of this part of this Act, be assessed to or in favour of any such petitioner, and also any costs which may be adjudged or awarded to him by the said Court, and also to perform

any decree or order which may be pronounced or made by the said Court.

Execution against the petitioner.

26. Notwithstanding anything hereinbefore in this part contained, it shall be lawful for Her Majesty to enforce any such judgment, order, or decree as aforesaid against the petitioner by execution, attachment, or other process, in the same manner as a defendant in any action or suit between subject and subject could or might enforce the same.

What claims within this part of this Act.

27. Nothing shall be deemed a claim or demand within the meaning of this part of this Act unless the same shall be founded on or arise out of some contract entered into on behalf of Her Majesty, or by the authority of Her local government.

SCHEDULE 10.

In the Supreme Court,

The day of .

To the Queen's Most Excellent Majesty,

Your faithful subject, *A.B.*, of Collins Street, in the City of Melbourne, builder, humbly sheweth:

That, &c.

Your suppliant therefore most humbly prays that your Majesty will be most graciously pleased to order that right be done in this matter, and that your Majesty's Attorney or Solicitor General may be required to answer the same, and that your suppliant may henceforth prosecute his complaint in the said Court, and take such other proceedings as may be necessary, And your suppliant as in duty bound shall ever pray.

Answer or Plea.

In the Supreme Court.

The day of .

Smith v. *The Queen.*

W. F. S., Esq., Attorney [*or* Solicitor] General of our Lady the Queen for the said colony, for and on behalf of our said Lady the Queen saith that, &c.

SCHEDULE 11.

I do hereby certify that *A.B.*, of &c., did on the day of obtain a judgment [order *or* decree] of the Supreme Court in his favour, and that by such [judgment] the sum of £ was awarded to him.

Dated the, &c.

L.S.

NEW ZEALAND.

34 Vict. c. 49. "An Act to provide for the Enforcement of Claims against the Crown in New Zealand."

1. The short title of this Act shall be the Crown Redress Act, 1871. Short title.

2. [Repealed and replaced by sect. 2 of the Crown Redress Act, 1877, *q. v. infra.*] Subjects enabled to sue the Crown.

3. The proceedings on such petition shall, subject to the provisions of this Act, be conducted in the same manner and subject as nearly as may be to the same rules of practice as an ordinary action between subject and subject, but an office copy of such petition shall be delivered at the office of the Attorney-General, and such delivery shall be equivalent to service of the writ and declaration in an ordinary action, and the Attorney-General or such person being a solicitor of the Supreme Court of New Zealand as shall from time to time be appointed by him for the purpose, may, for and on behalf of her said Majesty, appear to plead or demur to such petition at any time within twenty-eight days after such delivery as aforesaid of a copy thereof, or such further time as the Supreme Court or any judge thereof may allow, and it shall be lawful for the Attorney-General or such solicitor as aforesaid to plead and demur at the same time to any such petition or any other pleading thereon without leave of the Court or a judge, and the Attorney-General shall have the right to select the place of trial of the issues raised. Petition to be analogous to an action at law.

4. All pleadings after the delivery of such petition shall be respectively delivered between the petitioner and the Attorney-General or such solicitor to be appointed as aforesaid, and every such petition and pleadings respectively shall and may be in the form contained in the First Schedule to this Act, or to the like effect, and shall be entitled of the said Court and of the day and of the month and year when the same is filed or delivered, and shall bear no other time or date.

5. The said Court shall and may give and pronounce such and the like judgment order or decree in any such petition as such Court would give and pronounce in any action between subject and subject and a writ of error or appeal from any such judgment order or decree of the said Court in any action between subject and subject, and the costs of suit shall follow on either side as in ordinary cases between other suitors at law, any law or practice to the contrary notwithstanding. Judgment or decree and costs.

6. Except as hereinafter mentioned no execution or attachment or process in the nature thereof shall be issued out of the said Court in any such action, but after any such judgment order or decree as aforesaid against the Crown, shall have been given or pronounced, the Registrar of the said Court at the place where the same shall have been given shall give to the petitioner a certificate in the form contained in the Second Schedule to this Act, or to the like effect. Execution against the Crown.

Governor may pay damages and costs and perform decrees.

7. On receipt of such certificate it shall be lawful for the Governor to cause to be paid out of any money especially appropriated by the General Assembly to the purpose, such damages as may under the authority of this part of this Act be assessed to or in favour of any such petitioner, and any costs which may be adjudged or awarded to him by the said Court, and also to perform any decree or order which may be pronounced or made by this Court.

Execution against the petitioner.

8. Notwithstanding anything hereinbefore contained it shall be lawful for Her Majesty to enforce any such judgment order or decree as aforesaid against the petitioner by execution, attachment, or other process in the same manner as a defendant in any action or suit between subject and subject could or might enforce the same.

What claims within this Act.

9. [Repealed and replaced by sect. 3 "Crown Redress Act, 1877," *q. v. infra*].

Judges of the Supreme Court may make rules.

10. It shall and may be lawful for the judges of the Supreme Court or any two of them to make such rules as they may think necessary for regulating and conducting the practice and mode of procedure under this Act in all instances in which the practice and mode of procedure in civil actions between subject and subject is or shall be applicable.

SCHEDULES.

First Schedule.

In the Supreme Court of New Zealand.

The day of , 18 .

To the Queen's Most Excellent Majesty.

Your faithful subject, *A.B.*, of in Province [*or* County] of humbly sheweth:

That, &c. [Here set forth the grounds on which petitioner claims relief.] Your suppliant therefore most humbly prays that your Majesty will be graciously pleased to order that right be done in this matter, and that your Majesty's Attorney-General in New Zealand may be required to answer the same, and that your suppliant may henceforth prosecute his complaint in the said Court, and take such other proceedings as may be necessary. And your suppliant, as in duty bound, shall ever pray.

A. B.

Plea.

In the Supreme Court of New Zealand.

The day of , 18 .

A.B. v. *The Queen.*

Attorney-General of our Lady the Queen for the Colony of New Zealand, for and on behalf of our said Lady the Queen, saith that, &c.

SECOND SCHEDULE.

In the Supreme Court of New Zealand.

I do hereby certify that *A. B.*, of &c., did on the day of , in the Supreme Court at , in the Colony of New Zealand, obtain a judgment [order or decree] of the said Court in his favour, and that by such judgment [order *or* decree] the sum of £ was awarded to him. *A.B.* v. *The Queen.*

Dated this day of , 18 .

A. S. A.,

Registrar of the Supreme Court of New Zealand,

at

and

(L.S.)

41 Vict. c. 39. "An Act to Amend 'The Crown Redress Act, 1871.'"

1. The short title of this Act shall be "The Crown Redress Act, 1877." Short title.

2. Except as to causes of action which have arisen before the passing of this Act, sect. 2 of the Crown Redress Act, 1871, is hereby repealed, and this section shall be read in its place and stead: "When any person has any claim or demand against Her Majesty the Queen within the Colony of New Zealand, it shall be lawful for such person to set forth in a petition the particulars of his claim or demand as nearly as may be in the same manner as in a declaration in an ordinary action in the Supreme Court; and such petition shall be filed in the Supreme Court in the district in which the cause of action, claim, or demand shall have arisen, or mainly arisen, in order that such Court may proceed to hear and determine the same as hereinafter mentioned; and the filing of such petition in the manner aforesaid shall be the commencement of the suit: Provided that where any person has any claim or demand which is within the jurisdiction of a district court or resident magistrate's court, he may apply to Her Majesty's Attorney-General or Solicitor-General in New Zealand for his consent to the hearing and determination of such claim and demand in any such court to be named in the application; and if such consent shall be so given, the claim or demand may be heard and determined in the district court or resident magistrate's court, as the case may be, in like manner in all respects as in suits between subject and subject; and the provisions of the Crown Redress Act, 1871, and this Act, so far as applicable, shall apply to such suits accordingly. Persons having claims against Crown in New Zealand to proceed by petition.

3. Except as to causes of action which have arisen before the passing of this Act, sect. 9 of the said Crown Redress Act, 1871, shall be repealed, and this section shall be read in its place and stead: "Nothing shall be deemed a claim or demand within the meaning of this Act unless the same shall be founded on or arise out of some contract, act, What is a claim or demand.

deed, matter, or thing done, executed, or entered into by or under the authority, express or implied, of Her Majesty's Local Government in New Zealand, or for which the said Local Government would be responsible if they were private subjects of Her Majesty in New Zealand: Provided that no person shall be entitled by virtue of this Act to prosecute or enforce any claim against Her Majesty in the nature of an action for specific relief, or the performance of nor any action for damages for the breach of any contract for the purchase of waste or other lands of the Crown."

Statutes and rules in force in certain cases to apply.

4. So far as the same may be applicable, the laws, statutes, and rules in force, or that may hereafter be in force, as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, limitations, appeal, and proceedings in error, and all other statutes available as between plaintiffs and defendants in personal actions between subject and subject, and the practice and course of procedure of the Supreme Court in its legal and equitable jurisdiction respectively for the time being in reference to such suits and personal actions, shall, unless the Court shall otherwise order, be applicable and apply and extend to proceedings on a petition under the said Act and this Act.

Saving clause.

5. Nothing in this Act contained shall repeal or affect any of the provisions of "The Government Contractors Arbitration Act, 1872," or "The Public Works Act, 1876," and nothing in this Act shall apply to claims or causes of action which have arisen before the passing of this Act.

Filing of petition.

6. No person shall be entitled to prosecute or enforce any claim under this Act unless the petition setting forth the relief sought shall be filed within twelve months after the claim or demand has arisen; nor shall any such petition be so filed unless and until one month's previous notice in writing has been given to or left at the office of or forwarded by post to Her Majesty's Attorney-General or Solicitor-General in New Zealand, signed by the party intending to file such petition, his solicitor or agent, in which notice the claim or demand and the nature of the relief sought shall be explicitly stated, together with the name of the Court in which it is intended to file such petition.

INDEX.

ABATEMENT
of petition of right by
death of king, 31
where petition for tort, *ib.*
Lord Lyndhurst's judgment, *ib.*, 32
in other cases, 32
common law doctrine thereon, *ib.*, 33
not provided for by Petitions of Right Act, 1860..33
the true rule suggested, 34
death of subject, 40
bankruptcy of subject, 41
all the king's titles not being pleaded, 160

ABODE OF SUPPLIANT,
petition should state, 158

ACCOUNTS AND ENQUIRIES,
petition praying for, 79–80
order made for, on petition, *ib.*

ACTION,
right of, against the Crown.
none at the present day, 1, 24
either abolished by Ed. I., 2
or has never existed at common law, 3
authorities for and against considered, 3–5
right of action and right of petition considered, 52, 63

ADMIRALTY, LORDS OF,
Crown not liable for infringement of patent by, 58
instances of petitions against, 201–202

ADMIRALTY DIVISION,
Petitions of right may be intituled in, 154, 158

ADVOWSON
recoverable on petition of right, 73

AGENT,
can Crown be, for subject, 99, 100

AIDE LE ROY,
what it was, 118
when asked
either in nature of or warranty, *ib.*
or for feebleness of title, 119

ALIENS,
doubtful if they can sue a petition of right, 35
except under 40 & 41 Vict. c. 59, s. 20, *ib.*

AMENDMENT,
existing statutes, rules, &c., as to, applicable to petitions of right, 176
except where inconsistent with the prerogative, *ib.*

AMERICA,
Court of claims, in, 61
is the Court which entertains claims against Government, *ib.*
no claim in tort can be so entertained, *ib.*

AMOVEAS MANUS,
judgment of.
definition of, 183, 184
form of, *ib.*
where given formerly, *ib.*, 185
effect of, 48, 185
whether any other can be pronounced on petition of right, 184
not given under Petitions of Right Act, 182
but judgment given thereunder sometimes has the effect of, 184
whether given on a petition for recompense in value, 113, 117–120

ANSWER to petition of right. *See* ENDORSEMENT.

APPEAL,
existing statutes, rules, &c., as to, applicable to petition of right, 176

APPEARANCE,
Crown does not enter but pleads, 169
by third party, 171
form of, 197

ARBITRATION,
existing statutes, rules, &c., as to, applicable to petitions of right, 176

ARMY. *See* OFFICERS AND PAY.

ASSIGNMENT
of suit by petition of right.
by operation of law, 40
death of suppliant, 41. *See* ABATEMENT.
bankruptcy of suppliant, 41
by act of parties,
no authority for, 40

ATTORNEY
of suppliant, petition may be presented by, 158
if so presented should state name and address of, *ib.*

ATTORNEY-GENERAL,
former practice of suing in lieu of petition of right, 29, 143
reasons for so doing, *ib.*
right to a trial at bar, 170

AYNESHAM'S CASE
stated, 126
considered by Lord Somers a petition of right, 123
but more probably a petition for a *liberate*, 125

BANKERS' CASE, THE,
the facts of, stated, 113
was not a case of petition of right, 120
but of petition to the Barons of the Exchequer, 114
precedent upon which it proceeded, *ib.*
Lord Somers' argument in, 115, 120
that debts from Crown can only be recovered by petition to person of king, 121
such petition not necessarily petition of right, 122
but has been interpreted to mean so, 123
is the argument so interpreted correct?
it is not supported by precedent, *ib.*
and proceeds under a misapprehension of petitions in Parliament, 126
summarized, 130

BANKRUPTCY OF SUPPLIANT. *See* ASSIGNMENT.

BAR, TRIAL AT,
Crown's right to, 159, 170
Crown may waive right to and choose venue, *ib.*

BOOTY OF WAR,
petition will not lie for, 102–103, 153

"BOVILL'S" ACT. *See* PETITIONS OF RIGHT ACT, 1860.

BRITISH COLUMBIA,
Petition of Right Act in, 214

BRITISH HONDURAS,
Petition of Right Act in, 215

BROKE, J.,
his opinion that no writ ever ran against the king, 4

CANADA.
the right of Canadian subjects to sue by Petition of Right considered, 36–39
before the Canadian Petition of Right Act, 38
since the Canadian Petition of Right Act, 37

CANADA—*continued.*
what law governed by, 38
land in, not recoverable by Petition of Right sued in England, 45
Re Holmes, 46, 47
Courts of, will not entertain Petitions of Right for torts, 59
but *contra* of petitions in contract, 136, 137
the Canada Petition of Right Act, 216

CERTIFICATE
of tenor and purport of the judgment, 187
if suppliant successful to be made by judge, *ib.*
mode of and time for applying for, *ib.*
when obtained to be sent to Treasury or Treasurer of Household, *ib.*
form of, 200

CHANCELLOR. *See* LORD CHANCELLOR.

CHANCERY,
office of the,
different from the Court of Equity, 142
the office of the Chancellor, 10
out of which all original writs, &c., issued, 142
petitions touching the, to be set in one place, 15
travelled with the king, 10
commission to try the suppliant's title issued therefrom, 10, 22, 33
finding thereon returned into, 11, 159
applications to, in aid of common law right, 141
the Court of Equity. See EQUITY.

CHANCERY DIVISION,
Petition of Right may be intituled in, 158

CHATTELS:
recoverable on Petition of Right, 79–87, 113
both impure chattels such as leaseholds, 79, 80
and pure chattels, 87
can their value be recovered if lost, 88
two dicta thereon, 89

CIVIL SERVICE. *See* SUPERANNUATION.

COLONY,
has subject living in, right of suing by petition, 35–39
where colony governed by common law, 35
or possesses statutory right, 36
but not otherwise, 39
this question raised in Canada, 36
in what place a subject living in should sue his petition, 42
for property and claims, &c., within English jurisdiction, *ib.*
in England, *ib.*
for property and claims outside English jurisdiction,
in place where property, &c., situate, 43, 47, 49
if any enabling statute, 42
where none, 45–49

COLONY—*continued.*
land in, cannot be recovered by petition sued in England, 43, 45
contract with Crown made in, where to be sued upon, 42, 49
debts due from colonial governments, how recoverable.
See APPENDIX B.
is Queen present in, for purposes of petition of right, 46
stock, forming part of public debt of, how recoverable in England, 35, 154
when the English common law applicable to, 36

COLUMBIA. *See* BRITISH COLUMBIA.

COMMISSION
to try the suppliant's title, 11
issued from the Chancery, 10
warrant therefor the endorsement on the petition, 10
form of endorsement, 11
finding thereon returned to Chancery, 11, 12
of whom composed, 8
none necessary under Petitions of Right Act, 174

CONFESSO, PRO,
petition may be taken as, 182
forms of motion for, 198

CONTRACT WITH CROWN,
Petition of Right lies for damages for breach of, 108–140
history of the question, 109
no precedents for, previous to *Thomas* v. *Reg.*, 112
either on the rolls of Parliament, 123
the cases hitherto considered so being petitions for "*liberates*," 123–126
or in the old abridgments, 22
Lord Somers' opinion, 115
certain dicta relating to, stated and explained,
Comyns' opinion, 115, 131
Buller, J.'s, dictum in *Macbeth* v. *Haldemund*, 115, 131, 132
Lord Denman's in the *Baron de Bode's Case*, 116, 132, 133
judgments in *Tobin* v. *Reg.* and *Feather* v. *Reg.*, 116, 133, 134
more recent cases in which such claims had been entertained, 109
state of the law previous to *Thomas* v. *Reg.*, 108
liability of Crown not by virtue of any statute but at common law, 111
and extends to breaches of contract resulting in unliquidated damages, 110, 116
this rule laid down in *Thomas* v. *Reg.*, 116
grounds upon which this decision was based, *ib.*
these grounds examined, 117
(1) petitions for recompense in value, 117–120
(2) petitions for chattels, 120
(3) the *Bankers' Case*, 120–130. *See* BANKERS' CASE.

CONTRACT WITH CROWN—*continued.*
the rule in *Thomas* v. *Reg.* has been since adopted, 135–138
by the Court of Appeal, 135
by the Privy Council, 136
by the Canadian Courts, 138
precedent of petition for, 110
applies to contracts made by Crown for supply of public service, 188
and to contracts made by Crown in its private capacity, *ib.*
instances of particular contracts:
building contract, 205, 206, 209–211
charterparty, 201
conveyance of mails, 203
supply of forage, meat, &c., 201, 202, 209–211
fortifications, 209, 210
rent, 211

CORAM REGE PETITIONS,
meaning of, 16

CORODY,
recoverable on petition of right, 73

COSTS
against Crown
of successful petition recoverable, 186
but no writ of execution issues therefor, *ib.*
against third party,
are also recoverable, *ib.*
and execution can be issued in such case, *ib.*
against suppliant,
of unsuccessful petition recoverable by Crown and third party, 185
and execution can be issued therefor, *ib.*
such costs to be paid to Exchequer, 186
or to Treasurer of Her Majesty's Household, *ib.*
or third party, *ib.*
security for, 175, 181

COUNTY COURT, Admiralty, jurisdiction of,
does not include Petitions of Right, 158

COURT OR JUDGE,
definition of, 169

CROWN,
may be sued by petition, 1
no right of action against, *ib.* *See* ACTION.
acts of grace and favour, how asked from, 2
debts due from, how recovered. *See* DEBTS.
prescription against. *See* PRESCRIPTION.
liability of, on petition of right defined, 52

CROWN—*continued.*
not in tort, 53, 61. *See* TORT.
but for restitution of property, 68–107. *See* RESTITUTION.
and in contract, 108–140. *See* CONTRACT.
in equity. *See* EQUITY.
"individual" and "generic" existence, 33
where present for purposes of colonial claims, 46
decrees *in rem* against, 46, 47
decrees *in personam* against, *ib.*
cannot be guilty of laches, 60

DAMAGES,
unliquidated, for tort cannot be recovered on Petition of Right, 56
in contract. *See* CONTRACT WITH CROWN.

DEBTS,
due from Crown, how recovered,
old practice, 18, 23
formerly not by Petition of Right, 19, 20
reasons for this, 19
but by petition for a liberate, 21. *See* LIBERATE.
procedure on petition for a liberate, 21, 22
difference between it and Petition of Right, 23
new practice,
now by Petition of Right, 110–116
due from Colonial Government, how recovered.
See APPENDIX B.

DECLARATION OF TITLE,
petition praying for, 76, 78, 80

DECREE,
whether Court can make, against the Crown, 47, 142
appears to be contemplated under Petitions of Right Act, 1860..181
and to have been made in recent cases, 79
methods of enforcing, 142
whether applicable where Crown concerned, 143

DEMURRER,
by Crown to Petition of Right:
under Bovill's Act, 173
precedent of, to petition in contract, 111
precedent of, to petition in tort, 58
time allowed for, 169
may be extended by Court or judge, *ib.*
whether abolished by Supreme Court Rules of 1883..178
by subject to plea of Crown, 175
by third party to petition, 173, 174

DERIVATION,
of the name "Petition of Right,"
the same as "*petition de droit*," 25, 26

DERIVATION—*continued.*
of the name "petition of right"—*continued.*
why so called, 24
because of the "right" (*droit*) which the subject has, *ib.*
or because of the usual conclusion and endorsement, 25

DETENTION OF PROPERTY
by Crown:
either wrongful *ab initio* (*à tort*), 104
for the recovery of which petition lies, *ib.*
or under colour of right (*à droit*), *ib.*
for which no petition until shewn to be wrongful, *ib.*
appropriate remedies in such cases, "monstrans de droit" or "traverse of office," 106–107
by patentee or grantee of Crown:
may be proceeded against by action, 105
except where Crown's title is by judicial record, 107

DISCOVERY,
against suppliant:
Crown entitled to, 179
by delivering interrogatories, *ib.*
and obtaining discovery of documents, 180
by third party, *ib.*
by means of interrogatories, *ib.*
against Crown:
suppliant can neither interrogate, 179
nor obtain discovery of documents from, 178–179
reasons therefor, 179
possibly third party entitled to, in nature of writ of search, *ib.*
against third party:
suppliant entitled to interrogate, 178
when such interrogatories should be delivered, 192
should be filed, *ib.*
and possibly to discovery of documents, 179, 192

DISTRESS, WRONGFUL,
petition in Parliament for, 129

DOCUMENTS, discovery of, 178. *See* DISCOVERY.

DOWER,
petition for recovery of, 13

DROIT, PETITION DE. *See* PETITION OF RIGHT.

DUCHY OF CORNWALL,
suit by petition by lessee of lands in, against the Crown, 143

ENDORSEMENT,
the answer to the petition, 1, 8, 10, 165
was the warrant for all subsequent steps, 10

ENDORSEMENT—*continued.*
on petitions in parliament:
varied according to subject-matter of petition, 9
examples of, *ib.*
usually contained a direction to do "right," "justice," &c., 10
meaning of this direction, *ib.*
on petitions touching the Exchequer:
never "*soit droit fait aux* parties," 11, 21
on Petitions of Right, 11
by Crown:
earliest examples of, 12, 13
the giving by the Crown an act of grace, 25, 165
usual form "*soit droit fait als parties*," *ib.*
how given under Petitions of Right Act, 1860..163
form of, 165
either "general" or "special," 166
the effect of each, *ib.*
petition must be sued in accordance with terms of, 167
by suppliant:
praying for plea by Crown, 167
fee payable thereon, 167-8
for service on third party, 171
fee payable thereon, 173
form of, 197

EQUITY, petitions of right in,
the absence of authorities for thus proceeding, 141
the early applications to Chancery not being suits in equity, 142
reasons for the absence of authority, *ib.*
origin of equitable jurisdiction of the Court of Chancery herein, 143, 147
in petitions for leave to sue the Attorney-General, 144
Clayton v. *Attorney-General*, *ib.*
Taylor v. *Attorney-General*, 145
quære, whether these are petitions of right, 146
opinion of Wickens, V.C., thereon, 147
petitions herein under Bovill's Act, *ib.*
particular claims in equity,
an account, damages and injunction, 147, 150, 151
declaration of title, 148, 151
relief against forfeiture, 149
restoration of specific property, 153
superannuation allowance, 151
an order to convey, 149

EVIDENCE,
laws and statutes in force as to, applicable to Petition of Right, 175
means of procuring and taking sums as in actions, 176
except where inconsistent with Crown's prerogative, *ib.*
as to production of documents and interrogatories. *See* DISCOVERY.

EXCAMBIUM,
what it was, 117, 119
of what it consisted, *ib.*

EXCHEQUER, COURT OF,
one of the earliest State departments, 7
petitions in parliament relating to revenue referred to, 9
and transferred to, by Statute of Petitions, 15

EXECUTION.
none against the Crown, 186
against suppliant for costs, 185
against third party for costs, 186

EXTRAS,
petition for payment on account of, 138–148

FEES, payable by suppliant:
none for presentation of petition, 163
on marking a petition of right for service on Treasury Solicitor, 168
on marking a petition of right for service on third party, 173
on filing a petition of right, 168
in Court of Chancery, 193

FIAT. *See* ENDORSEMENT.

FILING the petition, 168
in the Writ Appearance, &c., Department, *ib.*
fee of £1 payable thereon, *ib.*
when it should take place, *ib.*

FOREST OF DEAN. *See* GALE.

FORFEITURE, relief against,
petition praying for, 78

FORMS
of petition, 195–6
of prayer of petition, 196
of indorsement for answer, 196
of indorsement for service on third party, *ib.* 197
of *præcipe* for appearance of third party, 197
of summons for extension of time, *ib.*
of notice of motion that petition may be taken *pro confesso*, 198
of answer or plea by Crown, *ib.*
of judgment in Queen's Bench Division, 199
of judgment in Chancery Division, *ib.*
of certificate of tenor of judgment, 200

FREEHOLDS,
petition formerly confined to recovery of, 70
that being the only interest of sufficient consequence, 112
later this rule abrogated, 113

FREEHOLDS—*continued.*
can be recovered upon Petition of Right, 71
instances, 70–78
in different counties cannot be included in same petition, 72

GALE,
definition of, 76
partakes of nature of realty, *ib.*
recoverable on Petition of Right, 76, 77, 78, 149
petitions for recovery of, 211, 212

GOLD COAST,
Petition of Right Act in, 216

GRANTEE OF CROWN,
how dispossessed
formerly by "*scire facias*" or "action," 28, 171-2
procedure under Petition of Right Act, 1860, 171–3

GRENADA,
Petition of Right Act in, 217

HOLT, LORD,
his opinion in the Bankers' Case, 114

HONDURAS. *See* BRITISH HONDURAS.

HONGKONG,
Petition of Right Act in, 218

INCORPOREAL HEREDITAMENTS
can be recovered upon Petition of Right, 70, 72. *See* RESTITUTION OF PROPERTY.

INDIA,
land in, not recoverable by petition in England, 43
debts due from Government of, not recoverable by petition in England, 43, 44, 98

INFRINGEMENT OF LETTERS PATENT. *See* TORT.

INJUNCTION against Crown,
petition praying for, 78, 148, 162

INQUISITION
to try the suppliant's title, 11
abolished, 174

INTERROGATORIES. *See* DISCOVERY.

INTEREST on money of which restitution has been obtained cannot be recovered by subject upon petition, 97
because no statute or contract, *ib.*

IRELAND,
Petition of Right Act in, 213
instance of an Irish claim the subject of a petition of right in England, 49

JAMAICA,
Petition of Right Act in, 219

JOINT CONTRACTORS
may sue by petition of right, 40

JOINT TENANTS
of realty may sue by petition, 40
or each may sue separately for his share, *ib.*
joint tenancy cannot be pleaded thereto, *ib.*
the Crown and subject cannot be, 29

JUDGMENT,
in default of pleading, 182
application for, how to be made, *ib.*
may be set aside on terms, *ib.*
form of judgment upon petition of right, 182–3
effect of judgment upon petition of right, *ib.*
on petition for restitution equals "*amoveas manus*," 183
of the judgment of "*amoveas manus*," *ib.* *See* "AMOVEAS MANUS."
forms of, 599

JUDICATURE ACTS,
how petitions intituled since, 158

JURISDICTION
of High Court of Justice in petitions
for lands in a colony, none, 42, 48
where Colonial statute provides means for their recovery, 43
where no such statute exists, 45
reasons for this, 47, 48
on contracts with Colonial Governments, 44
not where Colonial statute provides remedy, *ib.*
quære where it does not, 49
can Crown waive right of pleading to, *ib.*
of Colonial Courts not transferred to High Court by Petitions of Right Act, 47

KING'S COUNCIL,
petitions to, 6

LACHES
cannot be imputed to the Crown, 60

LAND
in England recoverable on petition of right, 70
instances and circumstances under which recoverable, 71, 72
but not land in colony, 46

LEASEHOLDS,
recoverable on petition of right, 79

LEEWARD ISLES,
Petition of Right Act in, 220

LEGACY,
can a petition of right be maintained for, 90

LETTERS PATENT,
method of repealing, by *scire facias*, 28, 141

LIBERATE, writ of,
definition of, 21
form of, 123
examples of, 125
petition for, 8, 21
difference between and a petition of right, 22
copied on to the Liberate Roll, 124
the last liberates issued, 125

LIMITATION, Statutes of,
Crown cannot take advantage of, 178
but subject bound by Intestates' Estates Act, *ib.*

LORD CHANCELLOR,
petitions in Parliament touching equitable matters referred to, 9
the Chancery is the office of, 10
formerly petition of right delivered to, after fiat, 10, 13
his jurisdiction over certain petitions, 14
can change the Court in which petition is intituled, 169
can change the venue named in the petition, 169
includes commissioners for executing the office of, 194

MANDAMUS
will not lie to procure endorsement, 165

MANITOBA,
Petition of Right Act in, 221

MAXIMS,
Qui facit per alium facit per se, 55
The king can do no wrong, 56, 58
The king never dies, 33
Actio personalis moritur cum persona, 31
Respondeat superior, 60
Contra non valentem agere non currit præscriptio, 38
Rex nihil aliud potest, quam quod de jure potest, 57

MESNE PROFITS
of property recovered by petition of right,
at Common Law subject not entitled to, 81, 84
statutory modification of this doctrine, *ib.*
by *Articuli super Chartas*, *ib.*
and Statute of Lincoln, *ib.*

MESNE PROFITS—*continued.*
of property recovered by petition of right—*continued.*
statutory modification of this doctrine—*continued.*
Coke's commentary thereon, 82
Lord Somers' opinion thereof, 83–85
effect of these statutes,
money paid into the Exchequer cannot be restored, 82, 83, 84
but money received by Crown receivers but not paid in, can, 82, 84, 85
modern doctrine on this point, 85
a recent decision upon the point, 86
comment thereon, *ib.*
recovery of, upon petition of right, 93
prayer for form of, 80

MONEY
can be recovered from Crown on petition of right, 90–96
money paid to Crown under mistake can. *See* RESTITUTION.
but not money paid by third person to Crown for benefit of subject, 97
thus money paid to Crown by foreign Government,
(1) as compensation to British subjects, 97–98
(2) or to pay debts due to British subjects, 99–101
cannot be recovered, *ib.*
prize money or booty cannot be recovered upon petition, 102–103

MONSTRANS DE DROIT,
origin and use of, 106
an alternative to petition of right, *ib.*

MOTION
that petition may be taken as confessed, 181
form of notice of, 198

NEGLIGENCE,
petition will not lie for, 54, 116. *See* TORT.

NEWFOUNDLAND,
Petition of Right Act in, 223

NEW SOUTH WALES,
Petition of Right Act in, 226

NEW ZEALAND,
Petition of Right Act in, 235

NIL CAPIAT,
judgment of, 183

NONSUIT,
suppliant may be nonsuited, 181
quære whether such nonsuit is peremptory, *ib.*

OBJECTIONS IN LAW whether Crown should take or demur, 178

OFFICERS, military
hold office at will of the sovereign, 150
Court cannot on petition of right investigate grounds of dismissal, *ib.*
cannot bring petition of right for pay, 150

ORDER OF COURT OF CHANCERY,
as to procedure on petition of right in Chancery, 191
general orders applicable to petition of right, 193

OUSTER LE MAIN,
judgment of. *See* AMOVEAS MANUS.
writ of, 184
issued to dispossess Crown patentee, *ib.*
effect of, *ib.*
does it issue against third party, 189–190

OWNER,
position of, where his tenant sued as third party, 173

PARLIAMENT,
rolls of, 6, 7. *See* ROLLS OF PARLIAMENT.
petitions in: *See* PETITIONS IN PARLIAMENT.
business of, in 14th century described, 7
a judicial and legislative body, *ib.*

PAUPER,
third party may defend *in formâ pauperis*, 173
and also suppliant can sue as, 181, 192
procedure with relation to, 193

PATENTEE
of Crown can be brought in as third party, 171
method of repealing letters patent, *ib.*

PAY OF OFFICER IN THE ARMY, petition of right does not lie for, 150

PETITION,
the right of approaching the Crown by,
to what it owes its origin, 4–5

PETITIONS IN PARLIAMENT,
originally very numerous, 7
reasons for this, *ib.*
their contents and nature, 7
some petitions of grace, 7, 51, 127
others petitions of right, 7, 127
illustrations, 7–13, 127–129
how dealt with originally by Parliament, 7, 11
referred to some tribunal for investigation, 8
such reference being by endorsement, 10
reasons for this course, 8

PETITIONS IN PARLIAMENT—*continued.*
how dealt with originally by Parliament—*continued.*
such tribunal either,
(1) ordinary legal tribunal, 9
(2) or applied by special commission, 10
mode of issue of special commission, *ib.*
warrant for the endorsement on the petition, *ib.*
form of endorsement, *ib.*
where the petition touched the revenue, 11
in other cases to do "right," 10
meaning of this endorsement, 11
the right of petitioning abused, 14
this abuse remedied by 8 Ed. I. and 12 Ed. I., 15
transfer of petitions in parliament under these statutes to ordinary legal tribunals, *ib.*
division of remaining petitions into, *ib.*
bills of (1) parliament, 16
(2) council, 17
(3) grace, *ib.*
how these various classes were ultimately dealt with, 18
cannot be considered as "decisions" upon the law of petitions of right, 65, 113, 130
of what they consist, 126-127

PETITION OF RIGHT,
definition of, 1, 69
origin of, *ib.*
either by Statute of Ed. I., 2
or at common law, *ib.*
authorities discussed, 3–5
history and development of uses of, 6–23
was originally presented in parliament, 6, 7
its relation to other parliamentary petitions, *ib.*
was similarly dealt with, 7
old common law procedure thereon, 11
referred to commissioners for investigation, *ib.*
commissioners finding returned into Chancery, *ib.*
Crown's plea thereto a subsequent proceeding, *ib.*
two illustrations, 12
survival of old common law procedure upon petition of right, 13
reason of this survival, 14
other parliamentary petitions transferred, *ib.*
either to the (1) ordinary legal tribunals, 15
(2) or parliament, 16
(3) or council, 17
but "petitions of right" not transferred, 18
new procedure under Petitions of Right Act, 1860, *ib.*
original uses of,
to obtain restitution of property, 19
but not recovery of debts, *ib.*

PETITION OF RIGHT—*continued.*
is a petition of grace, 16, 24
why so called, 24
Staunford's derivation discussed, 24, 25
the true derivation suggested, 25
to whom it lies, 27–31. *See* RESPONDENT.
who may sue by, 35–41. *See* SUPPLIANT.
is the right of suit assignable, 40–41
where the petition should be sued, 42–49
for property and claims, &c., within English jurisdiction in England, 42
for property and claims, &c., outside English jurisdiction. *See* COLONY.
for what it will not lie:
acts not amounting to legal injuries, 50, 52
torts, 53, 60. *See* TORT.
money received by Crown to use of subject, 97. *See* MONEY.
interest on money recovered, 96
where judgment cannot be enforced, 112
for what it will lie:
restitution of property, 68–97. *See* RESTITUTION.
damages for breach of contract, 108–140. *See* CONTRACT.
for equitable claims, 141–153. *See* EQUITY.
statutory claims, 154. *See* ADMIRALTY AND COLONIAL STOCK.
mesne profits, 81. *See* MESNE PROFITS.
the authorities discussed and classified, 65
form of, 158, 169, 195
how intituled, 158
signing of, *ib.*
contents of, *ib.*
must state venue, *ib.* *See* VENUE.
precedents of, 110, 111, 195
rules to be observed in drawing, 160
technical language unnecessary, *ib.*
all Crown's titles must be stated, *ib.*
allegation that suppliant a subject, *ib.*
prayer of. *See* PRAYER.
presentation of, 163. *See* SECRETARY OF STATE FOR HOME DEPARTMENT.
filing of, 168. *See* FILING.
endorsement of, 164. *See* ENDORSEMENT.
service on Treasury solicitor, 167
service on third parties, 171
how answered, 173
procedure upon, 175. *See* PROCEDURE.
judgment upon, 182. *See* JUDGMENT.
costs of, 185. *See* COSTS.
abatement of. *See* ABATEMENT.
transfer of. *See* TRANSFER.

PETITION OF GRACE,
definition of, 16
were presented in parliament, 127
sometimes mistaken for petitions of right, 51, 127
PETITION for leave to sue Attorney-General, 143, 145
"PETITIONS OF RIGHT ACT, 1860" (23 & 24 Vict. c. 34),
usually known as Bovill's Act, 18
procedure under an alternative to the common law practice, 18, 195
applicable to a suit for damages, 111
nature and scope of, 157
does not alter liability of Crown, 157, 176, 181
procedure under. *See* PROCEDURE.
PLEADING,
by subject,
quære whether rules of, applicable to petition, 160
certain rules to be observed in drawing the petition, 160, 163
by Crown
given by "Petitions of Right Act, 1860," 173
in the name of the Attorney-General, 174
prerogatives of, not altered by "Petitions of Right Act," 174, 176, 177
may plead double, 177
not governed by statutes relating to, *ib.*
may traverse generally, *ib.*
form of plea, 198
by third party
what defences available, 171
default of
by Crown or third party, 181
suppliant may apply for petition to be taken as confessed, 182
judgment of the Court on such application, *ib.*
POINTS OF LAW, whether Crown should raise or demur, 178
POSSESSION, PLEA OF, *quære* pleadable by third party, 175
POST-OFFICE not liable for tolls, 94, 95
PRAYER OF PETITION OF RIGHT,
of suppliant
defines the relief to which the suppliant claims to be entitled, 1, 160
may be, and formerly usually was, "general," 25, 160, 161
form of "general" prayer, *ib.*
but can be, and usually now is, "special," 160
instances of various forms of, 161–162
declaration of title, 77
relief against forfeiture, 78
direction for conveyance, 80
for inquiries for next-of-kin, 80, 162
for answer by Crown,
indorsed on petition, 167

PREROGATIVES OF CROWN,
to be sued by petition of right, one of the, 27
with respect to venue, 158, 169
may sue in what Court he pleases, 169
not altered by Petitions of Right Act, 176
in matters of pleading, 177

PRESCRIPTION, does time run against the Crown, 38

PRINCE
cannot be sued by petition of right, 27

PRIZE COURT,
claims cognizable by, now tried by petition of right, 158

PRIZE MONEY,
petition of right will not lie for, 102–103

PROBATE DUTY,
petition will lie for return of, 91, 162

PROBATE, DIVORCE AND ADMIRALTY DIVISION,
petitions of right may be intituled in, 154, 158

PROCEDURE:
upon petition of right,
at common law,
identical with that on parliamentary petitions, 7
nature of, 8–11
addressed to king or king and council, 6
answered by the king personally, 11
form of answer, 10, 11. *See* ENDORSEMENT.
then handed to the Chancellor, 10
issue of commission to try suppliant's title, 11
return of finding into Chancery, *ib.*
plea thereto by Crown, 11
by statute 23 & 24 Vict. c. 34:
in what Courts can be entitled, 157
form of petition, 157, 195. *See* PETITION OF RIGHT.
presentation of petition, 163
See SECRETARY OF STATE HOME DEPARTMENT.
endorsement of petition, 163. *See* ENDORSEMENT.
service on Treasury Solicitor, 167
endorsement thereon for answer, *ib.*
form of such endorsement, 196
plea or answer of Crown, 169, 173. *See* PLEADING.
service on third party if any, 171
endorsement thereon, *ib.*
plea or answer of third party, 173, 175
extension of time, 169, 197
venue, 170. *See* VENUE.
discovery, 179. *See* DISCOVERY.
rules of practice, 175–181

PROCEDURE—*continued.*
by statute 23 & 24 Vict. c. 34—*continued.*
judgment, 181. *See* JUDGMENT.
by default, *ib.*
after hearing, 182
effect of judgment, 183. *See* AMOVEAS MANUS.
costs, 185, 186
certificate of judgment, 187
satisfaction of judgment, 191
PUBLIC AND PRIVATE MATTERS,
definition of, 189
QUANTUM MERUIT,
petition on, by Canadian barrister for fees, 138
QUARE IMPEDIT,
petition in nature of, for advowson, 74, 142
QUEEN CONSORT
cannot be sued by petition of right, 27
authorities therefor, 28
QUEEN'S BENCH DIVISION,
petitions of right may be intituled in, 158
QUIET ENJOYMENT,
petition in Canada for breach of covenant for, 138
RELIEF,
definition of, obtainable by petition of right, 163, 194
RENT-CHARGE,
recoverable by petition, 73, 141
allegations which petition should contain, 73
REQUESTS,
origin of Court of, 7
RESPONDENT,
to petition of right, 1
who may be, 27–34
the king or queen, 27
but not a consort, *ib.*
or a prince, *ib.* *See* THIRD PARTY.
can a subject be joined with the Crown, 28–31
at Common Law :
subject cannot be joined, 29
because cannot be joint tenant, *ib.*
and has no prerogative to be so sued, *ib.*
this doctrine recently affirmed, 30
consequences of this doctrine avoided, *ib.*
by suing Attorney-General
under the statute (22 & 24 Vict. c. 34) :
subject cannot be joined, 30
but brought in as third party, 30, 31

RESTITUTION OF PROPERTY,
petition of right lies for, 66, 68
and was the original use of petition of right, 19, 68
authorities supporting this statement, 69–70
text-book writers, 69
decisions, 70
of what species of property restitution can be had:
both private property and property held *jure coronæ*, 188, 189
real property, *ib.*
early instances of, 12, 13
corporeal hereditaments, 70, 71, 72
incorporeal hereditaments, 73
rent charges, *ib.*
corodies, *ib.*
advowsons, 73, 74
seignories, 75
gales, 75, 76, 77, 78
the general rule given by Staunford, 71
formerly only lands in one county could be included in same petition, 72
personal property, 69, 79
early instances of, 12
chattel interests in land, 79
term under statute merchant, *ib.*
leaseholds, *ib.*
pure chattels, 87, 88
and possibly their value of lost, 69, 89
money, 70
paid to Crown under mistake, 90, 91, 92
mesne profits, 93
salary, *ib.*
tolls, 94, 95. *See* MONEY.
mesne profits. *See* MESNE PROFITS.
interest. *See* INTEREST.
form of prayer in petition for, 161-162

ROLLS OF PARLIAMENT,
the records of the business of the House, 6
petitions recorded thereon, 7. *See* PETITIONS IN PARLIAMENT.
and the answer thereto, *ib.*
but not the ultimate decision, 65
precedents for modern practice not drawn from, *ib.*

RULES OF PROCEDURE,
power of judges to draw, 191, 192

RULES OF SUPREME COURT,
applicable to petition of right, 175
except where inconsistent with the Crown's prerogative, 176

SAINT VINCENT,
Petition of Right in, 231
SCIRE FACIAS, WRIT OF,
what it was, 171
issued from the Chancery, 141, 171
used for dispossessing grantee from Crown, 28, 171
examples of, 141
now unnecessary, 171
SCOTLAND,
Petition of Right Act in, 213
SEARCH, WRIT OF,
for what purposes used, 171
SECRETARY OF STATE FOR HOME DEPARTMENT,
petition to be left with, 163
"*submits*" the petition to Her Majesty for fiat, 163, 164
no fee payable to therefor, *ib.*
usual course of procedure with regard thereto, *ib.*
what is a "submission" within the Act, 164
cannot refuse to submit petition, *ib.*
SECRETARY OF STATE FOR WAR,
Crown sued by petition for damages upon contract with, 110, 147, 150
SECURITY FOR COSTS,
suppliant may be called upon to give, 175, 176, 181
but not the Crown, 181
SEIGNORY
defined, 75
recoverable on petition of right, *ib.*
SERVICE OF PETITION OF RIGHT,
on the Treasury Solicitor, 167
on the department of Government to which it relates, *ib.*
on third party, 171
SET-OFF,
existing statutes, rules, &c., as to, applicable to petition of right, 176, 180
Crown can plead a set-off, 180
SHIPS OF WAR,
liability for negligent management of, 55
no liability of Crown for trespass by captain of, 55, 56
claims arising out of the exercise of belligerent rights by, 158
SOLICITOR TO THE TREASURY,
copy of petition and fiat to be left at office of, 167
such copy to be a printed and sealed one, 167, 192
otherwise service bad, 192
duties of, with respect to petition, 167
to communicate with department to which it relates, 167, 168
or with Lord Treasurer, 168
with regard to subsequent proceedings, *ib.*

SOMERS, LORD,
his statement with regard to the endorsement of petitions touching the revenue, 11
his argument in the Bankers' Case, 115. *See* BANKERS' CASE.

SPECIAL CASE,
existing statutes and rules as to, applicable to petitions of right, 176, 181

STAMP DUTY,
excessive, on probate recoverable by petition, 91, 92
excessive, on spirit license recoverable by petition, 49

STAR CHAMBER,
origin of Court of, 17

STATE PAPERS,
production of, in court of justice, 179

STATUTES,
8 Ed. I. (Statute of Petitions), 15
12 Ed. I. (Ordinance of Petitions), 15
28 Ed. I. c. 19 (*Articuli super Chartas*), 81
29 Ed. I. (*de escheatoribus*), 81
34 Ed. III. c. 14 (traverse of office), 106
36 Ed. III. c. 13 (traverse of office), *ib.*
1 Ed. VI. (abatement of suits), 32
1 Anne I. 8 (abatement of suits), 32
3 & 4 Wm. IV. c. 42, s. 28, 96
24 & 25 Vict. c. 40, s. 1 (Crown lands, Dean Forest), 76
27 & 28 Vict. c. 25, s. 53 (Naval Prize Act), 154
36 & 37 Vict. c. 66 (Judicature Act), 158
39 Vict. c. 27 (Canadian Statute—Petition of Right), 59, 137
40 & 41 Vict. c. 59 (Colonial Stock), 35, 154

STATUTE MERCHANT,
tenant under, interest of, recoverable on petition, 79

STRAITS SETTLEMENTS,
Petition of Right Act in, 227

SUBJECT
cannot be co-respondent with Crown to petition, 29. *See* RESPONDENT.

SUPERANNUATION ALLOWANCE (4 & 5 Wm. IV. c. 24, and 22 Vict. c. 26)
petition of right does not lie for, 152

SUPPLIANT
on petition of right,
who may be, 35–41
subjects governed by the Common Law, 35
quære aliens, *ib.*
except under 40 & 41 Vict. c. 59, *ib.*

SUPPLIANT—*continued.*
on petition of right—*continued.*
can colonial subjects sue, 37
if governed by Common Law, *ib.*
or possessed of statutory authority, *ib.*
but not otherwise, 37, 39
the case of Canadian subjects, 38, 39
can two subjects sue jointly, 39
the case of joint tenants of realty, 40. *See* JOINT TENANTS.
the cases of joint contractors, *ib.*
bankruptcy of. *See* ASSIGNMENT.
death of. *See* ABATEMENT AND ASSIGNMENT.
petition should state full name and address of, 158
signature of, to petition, *ib.*
petition should state that he is a subject, 160
TASMANIA,
Petition of Right Act in, 229
THIRD PARTY
can be brought in to answer a petition of right, 170
when in possession of the property sought to be recovered, 171
method of procedure against
served with a copy of petition and fiat, *ib.*
and copy of interrogatories, if any, in Chancery Division, 173
form of endorsement of petition for service on, 196
must appear within eight days, 171
and plead within fourteen days, 171
time may be extended, 171, 173
form of summons for, 197
form of appearance, 171, 197
where to be entered, 173
may defend *in formâ pauperis*, *ib.*
pleading by, 174
what defences available by, 173, 174, 175
quære whether can plead "possession," *ib.*
generally procedure same as in action, 175
judgment against, 181
for default in pleading, *ib.*
costs if successful recoverable, 185
may issue execution for such costs, *ib.*
effect of judgment against, 189, 190
TIME
for plea or answer by Crown, 167, 169
may be extended by order of Court or judge, 169
for appearance by third party, 171
for pleading by third party, 171, 196
form of summons for extension of, 197
TITHES,
petition in Parliament for, 129

TOBAGO,
Petition of Right Act in, 229
TOLLS.
Crown not liable to pay, 95
TORT,
petition of right does not lie for, 53, 54
either committed personally by the Crown, 56
or by the servants or officers of the Crown, 55, 60
same rule in America, 61
same rule in Canada, 59
particular instances, 54–61
negligence, 54, 59, 60
trespass to person, 60
trespass to property, 58, 61
infringement of patent, 58
landslip on Crown property, 212
reasons for Crown's immunity:
the king can do no wrong, 56, 58
this maxim explained, 56–57
cannot be treated as breach of contract and so made enforceable, 139
petitions in Parliament founded on acts in nature of, 129
TRANSFER OF PETITION
from Court to Court, 169
TRAVERSE OF OFFICE,
origin and use of, 106
an alternative to petition of right, 107
TREASURY, COMMISSIONERS OF H.M.'S,
tenor of judgment to be certified thereto, 187
must satisfy judgment so certified, 188
fund out of which satisfaction to be made, 189
TREASURY SOLICITOR. *See* SOLICITOR TO TREASURY.
TREASURER OF H.M.'S HOUSEHOLD,
represents Crown when sued in private capacity, 186
quære whether petitions should be served on, 168
pays costs of suppliant in such cases, 186
and tenor of judgment certified to, 187
judgment so certified to be satisfied by, 188
TRESPASS, petition will not lie for, 58, 60. *See* TORT.
TRIAL OF PETITION OF RIGHT.
statutes, rules, &c., as to trial of actions applicable to, 175, 176
except where inconsistent with Crown's prerogative, 176
TRUST
not enforceable against the Crown, 100
TRUSTEE,
whether Crown can be, 99, 101
Blackburn, J.'s opinion that Crown cannot, 100

VALUE, petition for recompense in,
nature of the claim, 112
precedent of such petition, *ib.*
nature of the judgment thereon, 113
opinion that it could not be an "*amoveas manus*," *ib.*
this opinion examined, 117–120

VENIRE FACIAS
formerly awarded to try the issue between subject and Crown, 159

VENUE.
in what country a petition should be sued, 42–49
practice relating to venue
at common law, 158
none appears to have been stated, 159
under Petitions of Right Act, 158–160
stated in the margin of the petition, 158
in petitions intituled in the Common Law Division, 159
and also now in Chancery Division, *ib.*
quære subject's right of choosing the, 159, 170
change of, 169
method of proceeding for change of, *ib.*
Crown's right of choosing under "Crown Suits Act," 170

VICTORIA,
Petition of Right Act in, 232

VINCENT, SAINT,
Petition of Right Act in, 231

VOUCHER.
king could not be vouched, 118

WAIVER
of right to plead to jurisdiction by Crown, 49

WARRANTY,
nature of, defined, 117

WESTERN AUSTRALIA,
Petition of Right Act in, 230

WILBY, J.,
dicta of, with regard to actions against the Crown, 3

WOODS AND FORESTS, COMMISSIONERS OF,
whether agents of the Crown, 54

WRIT,
quære whether, lies against the Crown, 3, 4
of voucher does not lie against the Crown, 118

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